Supreme Court, U.S.
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80-843

No.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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CARIBE TRAILER SYSTEMS, INC. and JOHN R. IMMER,

*Petitioners,*

*v.*

PUERTO RICO MARITIME SHIPPING AUTHORITY, *et al.*,

*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTIONS PRESENTED

1. Whether Puerto Rico Public Law No. 62 (1974) is immune from the Sherman Antitrust Act under *Parker v. Brown* so as to permit it to maintain a monopoly beyond its territorial boundaries.

2. Whether Puerto Rico Public Law No. 62 (1974) exceeds the authority granted to the legislature by Congress.

3. Whether Puerto Rico Public Law No. 62 (1974) violates the Commerce Clause of the Constitution.

4. Whether a State or Territory retains its sovereign immunity or any immunity beyond its boundaries.

5. Whether a lower court decision declaring Puerto Rico to be a "state" when such decision is in direct contradiction to a recent decision of the Supreme Court should be allowed to stand.

6. Whether a state or territorial government retains immunity from federal laws when it engages in a commercial shipping operation.

7. Whether corporations owned by the Government of Puerto Rico (PRMSA and PRPA) but not arms of that government can maintain the sovereign immunity of the Commonwealth of Puerto Rico from federal law.

8. Whether Petitioners have had proper appellate review and whether there have been irregularities in procedure where an appellate judge, who was involved in the case before appointment to the bench, refused to recuse herself and where the appellate court refused to write an independent opinion even though, *sua sponte*, it brought the Attorney General into a private lawsuit.

9. Whether the conspirators can escape the venue of the forum district when a substantial part of the work of the conspiracy and monopoly was performed within that district.

10. Whether the lower courts can ignore the mandate of 28 U.S.C. §1391(b) and refuse to allow venue at the place of injury.

11. Whether the trial court can disturb the forum selected by plaintiffs pursuant to federal statute where substantial acts occurred within the forum district.

12. Whether the trial court can ignore the "Long Arm" provision of the District of Columbia Code §13-423, which holds Respondents for venue.

13. Whether a decision of the lower court, which is unsupported by case law and in conflict with decisions within its own circuit and with decisions of other circuits as well as the Supreme Court, should be allowed to stand as a precedent when it abruptly violates far-reaching constitutional guarantees and vitally affects the entire Puerto Rican economy as well as all American shipping.

## LISTING OF PARTIES

Respondents in this case are:

Puerto Rico Maritime Shipping Authority ("PRMSA"),

Puerto Rico Ports Authority ("PRPA"),

R.J. Reynolds Industries, Inc. ("Reynolds"),

McLean Industries, Inc. ("McLean"),

Sea-Land Service, Inc. ("Sea-Land"),

T.K.M. Corporation ("TKM"),

Gulf Puerto Rico Lines, Inc. ("GPRL"),

Sun Shipbuilding and Dry Dock Co. ("Sun Ship"),

Transamerican Trailer Transport, Inc. ("TTT"),

American Union Transport, Inc. ("AUT"), and

Trans Ocean Transportation Executive Management, Inc. ("TOTEM").

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## JURISDICTION

This case was originally brought before the Federal Court of the District of Columbia on March 13, 1978 under the Sherman Antitrust Act, 15 U.S.C. §§1-3 and under Section 4 of the Clayton Act, 15 U.S.C. §15. No discovery or evidentiary proceedings were allowed by the trial court which entered a summary judgment in favor of defendants on April 23, 1979.

The *per curiam* order of the United States Court of Appeals, District of Columbia Circuit, supporting the lower court decision and dismissing the case, was issued

on July 3, 1980 with no opinion or memorandum. Petitioners' Application for Rehearing, or in the Alternative Rehearing *En Banc* was denied on August 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Petition was filed within ninety days of the order of the District of Columbia Circuit denying a rehearing.

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

**1. Sherman Antitrust Act, Section 1, 15 U.S.C. §1.**

§1. Trusts, etc. in restraint of trade illegal; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred fifty thousand dollars or by imprisonment not exceeding three years, or by both said punishments in the discretion of the court.

- as amended Dec. 21, 1974, Pub. L. 93-528, 3, Stat. 1708; Dec. 12, 1975, Pub. L. 94-145, 2, 89 Stat. 801.

**2. Sherman Antitrust Act, Section 2, 15 U.S.C. §2.**

§2. Monopolizing trade a felony; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and on conviction thereof,

shall be punished by a fine not exceeding one million dollars if a corporation, or, if any other person, one hundred fifty thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

- as amended Dec. 21, 1974, Pub. L. 93-528, 3, Stat. 1708.

**3. Sherman Antitrust Act, Section 3, 15 U.S.C. § 3.**

§ 3. Trusts in Territories or District of Columbia illegal; combination a felony.

Every contract, combination in form of a trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred fifty thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

- As amended Dec. 21, 1974, Pub. L. 93-528, 3, Stat. 1708.

**4. Commerce Clause of the Constitution, Article 1, Section 8, Clause 3.**

To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes;

**5. The Constitution, Congressional Authority, Article 4, Section 3, Clause 1.**

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

**6. 2nd Puerto Rico Organic Act, 48 U.S.C. §821.**

The legislative authority shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate, and reorganize municipalities so far as may be necessary, and to provide and repeal laws and ordinances therefor; also the power to alter, amend or modify any and all laws and ordinances of every character in force in Puerto Rico or municipality or district thereof on March 2, 1917 c. 145 37, 39 Stat. 964; May 17, 1932, c. 190, 47 Stat. 158.

**7. Clayton Act of 1910, §4, 15 U.S.C. §15.**

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

**8. Clayton Act of 1910, §12, 15 U.S.C. §22.**

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in

any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

**9. General Federal Venue Provision, 28 U.S.C. §1391.**

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose. (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all the defendants reside, or in which the claim arose, except as otherwise provided by law. (c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business, and such judicial district shall be regarded as the residene of such corporation for venur purposes.

**10. D.C. "Long Arm" Provision, D.C. Code, §13-423.**

§13-423. Personal jurisdiction based upon conduct

(a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's –

(1) transacting any business in the District of Columbia;

(2) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;

(4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia.

## STATEMENT OF THE CASE

In Brief Outline the Undisputed Facts are as Follows:

1. A special Commission to study shipping to Puerto Rico was set up by the Puerto Rican Senate on March 8, 1973. Shortly after that Mr. Teodoro Moscoso, a director of PRPA and later a director of PRMSA, hired Mr. Francis Kesterman, a shipping consultant in Washington, D.C., to evaluate shipping proposals. He was assisted in this selection by Mr. Mario Escudero, an attorney for PRPA and later PRMSA, whose offices are located in Washington, D.C. By December of 1973 the Governor decided to create a shipping monopoly which would control all shipping to and from Puerto Rico. This decision was kept secret and not revealed to the public until after March, 1974.

2. On June 10, 1974, the Puerto Rico legislature passed Public Law 62 which authorized the formation of PRMSA to exclusively operate shipping services to and from the island as a commercial operation, domestic and foreign. Most of these operations were to be outside the territorial limits of the island and were to involve interstate commerce. During October, 1974, PRMSA acquired the Puerto Rican services and equipment of Sea-Land, Seatrain and TTT, comprising approximately 90% of all the liner capacity of the Puerto Rico-mainland trade, and has since operated these services as a shipping monopoly. The new service of PRMSA eliminated all direct liner service and restrained the trade to the ports of Boston, Philadelphia and Mobile which ports still in 1980 have no direct liner service.

3. On January 4, 1973, Petitioners filed an application before the U.S. Maritime Administration (Marad) for a mortgage loan guarantee for a 500-unit trailer ship to be

used on a service to Puerto Rico. The application was processed at first with complete cooperation of Marad officials but sometime in April or May of 1973 the climate changed to that of an adversary action and thereafter Petitioners were beset with numerous conflicts and demands. Finally, on March 13, 1974, Petitioners were told by Marad that the application was denied.

4. Petitioners claim that a major reason for this denial was the knowledge of Marad of the planned shipping monopoly and that it has since been unable to raise capital because of the existence of a government-owned shipping monopoly on this service.

5. On February 11 and 12, 1974, various representatives of the Puerto Rico government, including Mr. Moscoso, met with representatives of Sea-Land, Seatrain and TTT to discuss plans for a conspiracy by which the Puerto Rican government would acquire these services and operate them as a single unit with a management company to be supplied by Sea-Land. It was noted that Marad was aware of the proposal. Mr. Escudero was to take action to forestall any legal threat to the monopoly (Appendix D, p. 40a). At this meeting and in later negotiations Mr. Malcolm McLean represented and acted for Sea-Land, McLean Industries, Inc. and R.J. Reynolds Industries, Inc. Later, other Respondents became involved through agreements and other actions taken in regard to the conspiracy and the acquisition of the Puerto Rico services of the three private shipping lines.

6. Thereafter, various memoranda of agreement, contracts for sale and transfer of equipment and facilities and management contracts were prepared (most of this work being done in offices within the District of Columbia).

These documents were signed in New York City, Philadelphia, the Bahamas, San Juan and other places. Most of Mr. Kesterman's work directed by Mr. Moscoso in 1973 and 1974 was done within the District of Columbia where he lived and had his office. See Appendix E, p. 43a.

7. Respondents admit to the facts presented by Petitioners and admit to the conspiracy and to the setting up and operation of a shipping monopoly. The standing of Petitioners to sue has not been challenged. The damage to Petitioners has not been contested. The only defense of Respondents is the alleged immunity of the Puerto Rico legislature from antitrust laws in extraterritorial actions and the immunity of PRMSA and PRPA and the others who rely on that immunity. Venue has been challenged for McLean, Reynolds and GPRL and the choice of forum selected by Petitioners for these parties has been rejected. Petitioners have had no discovery or evidentiary proceedings in the case but were forced to rely on the pleadings including certain documents and testimony obtained in an earlier action before the Federal Maritime Commission.

## REASONS FOR GRANTING THE WRIT

The issue here is a one-judge decision of a lower court which says that Puerto Rico is a state, is immune from the Sherman Antitrust Act and has the power to establish a shipping monopoly and engage in commercial activities beyond its territorial limits and to restrain and control trade between Puerto Rico and the states and foreign countries. Both the lower court and the appellate court ignored pleas of Petitioners that the Commerce Clause of the Constitution applied and that the Puerto Rican legislature did not have the authority to pass legislation in

interstate commerce or to restrain trade with the states on the mainland.

The decision rests upon legal points unsupported by case law and is in direct conflict with previous decisions within the circuit, decisions of other circuits and with decisions of the Supreme Court.

Petitioners were denied the benefits of appellate review. The three-judge panel included a recently appointed judge who was formerly an Assistant Attorney General of the United States who had participated in the pre-trial efforts below. Thereafter, the appellate court felt this case of sufficient importance to solicit, *sua sponte,* an *amicus curiae* brief from the United States. The Attorney General (not the Solicitor General as required by 28 C.F.R. §0.40) obliged by submitting a brief supporting Respondents' position and containing, *inter alia,* fifty-five pages of entirely new material after oral argument, which material was obtained only in collusion with Respondents. This *amicus curiae* brief was delayed nearly two months until this new material could be supplied. Despite all this, the appellate court refused to write an opinion on these important matters but simply gave a ten-line *per curiam* decision sustaining the trial court.

The decision being appealed from says that state and territorial governments have immunity from the Sherman Antitrust Act and presumably from other federal laws when they set up monopolistic commercial operations.

Specifically, it says that the entire ocean-borne trade from the mainland to Puerto Rico shall be carried by a government owned monopoly to the exclusion of private enterprise. As the government acting through PRPA controls all the port facilities of the island it can and has pre-

vented competition in this service. Puerto Rico is the largest off-shore maritime customer of the United States mainland. The Maritime Administration projected in 1973 that the total cargo on the U.S./Puerto Rico trade would reach 16 million tons in 1980 and 28 million tons in 1990. Outgoing shipments to Puerto Rico from the U.S. alone amounted to $4.3 billion in 1979 for nearly six million short tons. The impact of efficient shipping on the economy of Puerto Rico must be measured in billions of dollars and thousands of jobs for the islands. These jobs depend on efficient and dependable ocean transport.

The decision below would permit any state to set up its own shipping or transport monopoly. As most of the states already control their ports the decision below can be expected to lead to the formation of state-owned trucking, railroad or even airline companies in order to siphon more trade into their own ports. Such control over transport by the state will bring back all the evils of monopoly power to transport.

## I.
## EXTRATERRITORIAL IMMUNITY Of STATE GOVERNMENTS UNDER PARKER v. BROWN INVADES COMMERCIAL AREA.

That a state or territorial government can set up a shipping monopoly beyond its boundaries and enter interstate and foreign trade to the detriment of other states is contrary to the American system and up to now has never been sustained by the courts or the law.

The decision of the lower court that PRMSA and PRPA "are exempt from antitrust liability under the *Parker* doctrine" is not supported by *Parker* and, in fact, is specifically excluded from such support by the wording

of the decision. *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, (issued in 1943) was very mindful of *Ohio v. Helvering*, 292 U.S. 360, 54 S.Ct. 725, 78 L.Ed. 1307 (1934) which said at page 369: "When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader." This statement was also cited as controlling in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 696 (1976). *Parker v. Brown, supra*, at p. 352 specifically rejected any question of involvement of the state with private interests or the operation by the state of any activity which restrained trade. That *Parker* specifically excluded immunity for a commercial operation of the state was cited by Chief Justice Burger in his dissenting opinion in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 422 (1978) where he referred to "a sovereign's decision - as in *Parker* - to replace competition with regulation."

Respondents and the courts below base their entire defense on a misconstrual of *Parker v. Brown, supra*, as permitting a state government to displace competition and set up a monopoly of its own commercial activities including "extraterritorial coverage" involving interstate commerce.

This is a misstatement of what *Parker* said. *Parker* said that the Sherman Act was not intended to apply to a state where no instrumentality of the state was involved in a monopolistic action, where there was no element of interstate commerce and where there was not the slightest suspicion that there was any violation of the Commerce Clause of the Constitution. One half of the entire decision was taken up with this last point.

The normal assignment of sovereignty matters within the state of California as delineated in *Parker* was distorted and misconstrued by the lower court decision in order to support the creation of a Commonwealth-owned shipping monopoly which has restrained trade with the U.S. mainland. This is the very type of rapacious action of one state by another which the Commerce Clause was designed to prevent. That the immunity of a state or territory extends beyond its territorial boundaries even when engaged in a shipping monopoly which restrains interstate commerce between certain ports is a novel and unique concept offered without any case support and in direct conflict with a solid array of Supreme Court decisions. Such a decision should be reviewed by this Court.

## II.
## THE LOWER COURT PRESUMES TO GRANT POWERS TO THE PUERTO RICO LEGISLATURE WHICH HAVE NOT BEEN GRANTED TO IT BY CONGRESS.

The decision of the lower court grants to the Puerto Rico legislature the power to legislate in other than local matters and to legislate in interstate commerce and to interfere with trade between the states. These things are beyond the powers granted by Congress to the legislature of Puerto Rico and constitute a usurpation by the court of powers reserved by the Constitution to Congress.

The Legislature of Puerto Rico has the authority only to pass those laws authorized by Congress in the 2nd Organic Act of 1950, specifically as set forth in 48 U.S.C. §821. *Caceres v. San Juan Barge Co.*, 387 F.Supp. 221 (D.C.P.R. 1974), aff'd. 520 F.2d 305. The authority is limited to the territorial boundaries of the island and its adjacent waters. *Huckins v. Board of Regents, supra.* That the territorial limits of the island were the limits of power of the Puerto Rican legislature was stated by the

2nd Circuit in *Williams v. McAllister Bros. Inc.*, 534 F.2d 19 (1976). Even within Puerto Rico the courts have maintained that Puerto Rico is not authorized to supplant maritime law. *Santiago v. Hermanos*, 255 F.Supp. 932 (D.C.P.R. 1966).

The lower court decision would grant to Puerto Rico greater powers than those enjoyed by any state in the Union. It is in direct conflict with the decisions of other circuits as well as the powers granted to the legislature of Puerto Rico which only Congress can grant.

## III.
## CONTROL OF INTERSTATE COMMERCE AND RESTRAINT OF TRADE BY A STATE VIOLATES THE COMMERCE CLAUSE.

When a state or territory invades the area of interstate commerce or restrains trade it violates the inherent rights of other states to engage freely in interstate commerce as guaranteed by the Commerce Clause of the Constitution. In *Reeves, Inc. v. Stake*, ___ U.S. ___, 100 S.Ct. ___, 65 L.Ed.2d 244, 252 (1980), the Court said:

> "We granted Reeves' petition for certiorari to consider once again the impact of the Commerce Clause on state proprietary activity."

The same issue and the same danger is involved here. *Reeves v. Kelly*, 99 S.Ct. 2155, was remanded on the basis of *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979) where the Court at 99 S.Ct. 1731 pointed out the danger of any "Balkanization" of the Union.

Puerto Rico Public Law No. 62 (1974) established a Puerto Rican government-owned shipping company to handle trade exclusively between Puerto Rico and the other states. The first thing done was to eliminate direct service for liner cargo to Boston, Philadelphia and Mobile.

It then reduced the container capacity on the other routes. By collusion of PRPA and PRMSA Seatrain was prevented from re-entering the Puerto Rico trade in 1976. *PRPA v. F.M.C.*, C.A.D.C. No. 78-1950, June 10, 1980, ___ U.S. App. D.C. ___, ___ F.2d ___.

*Parker* said specifically that a state could violate the Sherman Act if it became "a participant in a private agreement or combination by others in the restraint of trade." 317 U.S. at 352. The acts of the respondents of this case constitute such a violation, regardless of whether or not PRMSA and PRPA are "arms of the government" or mere instrumentalities without immunity.

*Parker v. Brown* itself said that states remained under the stricture of the Commerce Clause and emphasized that the State of California had acted in a matter which did not involve interstate commerce and was not violative in any way of the Commerce Clause of the Constitution. Petitioners properly raised the issue before the lower court but were ignored. The issue was also ignored by the appellate court. Does the Commerce Clause permit the operation of a state-owned monopoly in interstate commerce in violation of federal law? Now only the Supreme Court can prevent that.

## IV.
## EXTENSION OF IMMUNITY BEYOND THE BOUNDARIES OF A STATE IS IN CONFLICT WITH COURT DECISIONS.

The decision of the lower court brushes off any limitation to the sovereign immunity of a state simply because the action and operation is "extraterritorial." Petitioners aver that the lower court decision is directly in opposition to *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, affirming a California decision (141 Cal. R. 441

(1977)) which said that "state sovereignty ends at the state boundary." Puerto Rico has no sovereignty and no immunity from any federal law beyond its territorial limits.

## V.

## THE RULING OF THE COURT BELOW THAT PUERTO RICO IS A STATE IS CONTRARY TO RULINGS OF THE SUPREME COURT.

Much legal confusion will result from the decision which says that Puerto Rico is a state. The decision of the lower court says that Puerto Rico is a state "for purposes of applying the *Parker* doctrine." The only case cited in support of this new concept was *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 351 F.Supp. 1153, 1229 (D. Hawaii 1972), mod. on other grounds, 518 F.2d 913 (9th Cir. 1975), which said only that "It is properly inferrable . . . that the Commonwealth of Puerto Rico is entitled to as much respect for its soversignty as was the state of California in *Parker v. Brown.*" In order to clarify this statement the ITT Court said further at p. 1230: "There is no question that, as a general proposition, the federal antitrust laws are applicable in Puerto Rico. . ."

In any case, the Supreme Court ruled on May 27, 1980, that Puerto Rico is a territory and that Congress "may treat Puerto Rico differently from States so long as there is a rational basis for its actions." *Harris v. Rosario*, No. 79-1294, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___. Therefore, the decision of the lower court, based as it is on the ruling that Puerto Rico is a state, should be struck down.

## VI.
## THE COURT HAS CONSISTENTLY REJECTED IMMUNITY FROM FEDERAL LAW WHEN A STATE ENGAGES IN COMMERCE.

The lower court was clearly wrong when it granted immunity to a territorial government in a strictly commercial operation. The decision cannot stand in the face of *Ohio v. Helvering, supra.*, which was restated in 1976 in *Alfred Dunhill of London v. Cuba, supra.* To permit a monopoly of the Commonwealth government in a commercial shipping enterprise is not only a serious blow to American shipping but could be the genesis of the Balkanization of the States of the Union.

Even where a recognized instrumentality of the state, ordinarily retaining the immunity of the state, engages in interstate commerce or navigable waters, it loses its immunity from federal law. *Huckins v. Board of Regents,* 263 F.Supp. 622, 623 (Mich. 1967) which relied on *Parden v. Terminal Railway of Alabama State Docks Dept.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964). In *Cocherl v. State of Alaska,* 246 F.Supp. 328 (D. Alaska 1965) the operation by the State of Alaska of a vessel as a common carrier in interstate commerce on navigable waters of the United States was ruled to constitute a waiver of its sovereign immunity and to subject it to federal laws. This decision was controlled by *Parden, supra* and *Petty v. Tenn.-Mo. Bridge Commission,* 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1958).

How can a lower court decision be allowed to stand without any case support whatsoever in such blatant conflict with decisions from other circuits, all of which are based upon decisions of the Supreme Court?

## VII.
## THAT PUERTO RICO MARITIME SHIPPING AUTHORITY AND PUERTO RICO PORTS AUTHORITY HAVE IMMUNITY IS CONTRARY TO ALL CASE LAW.

The lower court decision says that the Puerto Rico Maritime Shipping Authority (PRMSA) and the Puerto Rico Ports Authority (PRPA) are agencies of the Commonwealth of Puerto Rico and are not subject to antitrust laws. Such an opinion is not supported by any case law and is contrary to what all previous decisions, most of them in federal courts in Puerto Rico, have said. The decision is contrary to the criteria set forth in *Cancel v. San Juan Construction Co.*, 387 F.Supp. 916 (D.P.R. 1974). These two government-owned corporations have their own sources of income from fees and rates charged for services and the Puerto Rican government is properly insulated from their losses.

Federal courts of Puerto Rico and the 2nd Circuit have ruled that PRPA is a public corporation, is subject to suit and federal laws and has no sovereign immunity. *Can. Transport Co. v. PRPA*, 333 F.Supp. 1295 (D.C.P.R. 1971); *Krisel v. Duran*, 258 F.Supp. 845, 853 (S.D.N.Y. 1966); *PRMMI v. Int'l L. Ass'n., AFL-CIO*, 398 F.Supp. 118 (D.C.P.R. 1975). In the 2nd Circuit, the Court ruled in *Star Lines, Ltd. v. PRMSA*, 442 F.Supp. 1201, 1207 (S.D.N.Y. 1978) that PRMSA is subject to an antitrust suit in the State of New York. Later, in a confirming action in the same matter, *Star Lines, Ltd. v. PRMSA*, 451 F.Supp. 157 (S.D.N.Y. 1978) said that PRMSA has no immunity from liability under the federal antitrust laws.

Other case law should be respected and the decision should be reversed to bring it into line with the other decisions. Assuming, arguendo, that the Puerto Rico

legislature had the power to impose a shipping monopoly on other states, the instruments used for this purpose would have to have immunity, otherwise the immunity of the sovereign could not be claimed. The government of Puerto Rico is not a party to this suit. Immunity is claimed through two government-owned corporations whose immunity has already been denied in all cases where this has been considered.

## VIII.
## SERIOUS DEPARTURES FROM THE USUAL COURSE OF PROCEEDINGS IN THE FEDERAL COURTS REQUIRE THE ATTENTION OF THE SUPREME COURT.

Petitioners aver that there have been improper influences of the Department of Justice exerted on this case in the lower court and in the Court of Appeals which have prevented an objective application of the law and court decisions to the issues of this case.

Petitioners are prepared to show in brief that there has been a cohesion of interest between the Respondents and the Department of Justice with a consistent pattern of support for this monopoly since 1974 over and beyond the limits permitted by the Code of Federal Regulations.

Petitioners can show that the judge in the lower court gave serious weight in his decision (at p. 4) to the fact that "the Antitrust Division granted favorable clearance on July 22, 1974." Having thus been assured that approval had been given to the project by the United States government even though it was identified as giving "PRMSA control over ninety percent of the then-existing ocean shipping services," the judge then proceeded to jusitify this decision by assertions which were not supported by any case law and, in fact, were violative or contradictory of all court decisions pertinent to this area.

The error of the judge was compounded by the fact that the Business Review Letter on which he relied was issued to the Commonwealth of Puerto Rico which, according to 28 C.F.R. 50.6, ¶4, cannot apply to any party not on the original application. The Commonwealth government is not a party to this suit. Therefore, there is no legal basis for basing the lower court decision on this Letter which does not apply to any of the respondents of this case. Petitioners are justified in asking for a reversal of the entire decision on this one point alone.

Petitioners can show that a judge of their appellate panel was an immediate past Assistant Attorney General and in that capacity had been involved with a previous complaint of Petitioners and did not recuse herself from the case. That complaint was directed against the U.S. Maritime Administration which is under the Secretary of Commerce who was at that time a director of one of the Respondents. Shortly after her appointment to the panel the Court issued, *sua sponte,* an order bringing in the United States Government as an *amicus curiae.* The Attorney General, not the Solicitor General as required by 28 C.F.R. §0.40, did not defend federal law but presented legal conclusions diametrically opposed to earlier briefs of the Solicitor General, i.e. the Attorney General maintained that Puerto Rico is a territory. See Solicitor General's brief in *Harris v. Rosario, supra.* Two days after the filing of a reply by Petitioners the Court issued a per curiam decision with no opinion and no memorandum.

Where constitutional issues have been raised and there is such a conflict with previous court decisions the per curiam decision becomes a mechanism which permits the Court to conceal any departure from the usual course

of proceedings and Petitioners submit that there have been such departures.

## IX.
## COURT DECISIONS SUPPORTING CONSPIRACY THEORY WERE IGNORED AND DISREGARDED.

The lower court decision ignored and rejected the established rule of its own circuit that all members of a conspiracy are bound for venue where a substantial part of the work of the conspiracy took place within the forum district. *Mandelkorn v. Patrick,* 359 F.Supp. 692 (D.C. 1973) and *Berlin Demo. Club v. Rumsfeld,* 410 F.Supp. 144 (D.C.D.C. 1976).

Since then, this conspiracy theory has become the accepted rule for venue in other circuits. See *California Clippers, Inc. v. U.S.S.F. Associates,* 314 F.Supp. 1057, 1067. In the 4th Circuit the Court said: "When individuals join in a conspiracy the acts of one conspirator are attributable to each co-conspirator." *McLaughlin v. Copeland,* 435 F.Supp. 513 (D. Md. 1977). See also *Gemini Enterprises, Inc. v. WFMY, Tel. Corp.,* 470 F.Supp. 559, 564 (M.D.N.C. 1979).

*Ladner v. U.S.,* 168 F.2d 771 (5th Cir. 1948) stated that "venue in the prosecution may be laid in any district in which any act in furtherance thereof was committed by any of the conspirators," and relied on *Hyde v. U.S.,* 225 U.S. 347, 32 S.Ct. 793, 56 L.Ed. 1114 (1912). *U.S. v. Snead,* 527 F.2d 590 (1975) of the 4th Circuit also said the same thing and also relied on *Hyde, supra.*

Where a not insubstantial part of the work of the conspiracy was performed in the forum district the decision not to grant venue on this basis was without support of

other cases and contrary to case law as observed in this and other circuits.

X.

**PETITIONERS WERE DENIED BENEFIT OF SECTION 1391(b) IN ESTABLISHING VENUE WHERE CLAIM AROSE.**

The lower court decision cites *Redmond v. Atlantic Coast Football League,* 359 F.Supp. 666, 672, S.D. Ind., aff'd. mem., 478 F.2d 1405 (7th Cir. 1973) but ignores the part of *Redmond, supra,* at p. 672 which says that venue will lie in any district where there are overt acts constituting a significant and substantial element of the offenses charged.

The lower court decision is contrary to the provisions of Section 1391(b) which allow venue in the district where the claim arose.

XI.

**PETITIONERS WERE DENIED THEIR CHOICE OF FORUM DISTRICT IN A DIVERSITY CASE.**

The lower court decision denies venue for Reynolds, McLean and GPRL, admits unquestioned venue for Sea-Land and leaves the question of venue for the others undisturbed. This is the sort of situation which Section 1391(b) sought to prevent.

This rule on venue in the District of Columbia Circuit was set by *Lamont v. Haig,* 192 U.S. App. D.C. 8, 590 F.2d 1124, 1134 (D.C. Cir. 1978) which assured the existence of at least one forum where multiparty litigation was involved. The decision (App. A, p. 16a) admitted that some acts and contacts took place within the forum district and said only that state action exemption would preclude liability for the other defendants.

This denial of venue was contrary to the two court decisions in *Star Lines, Ltd. v. PRMSA, supra.* In those decisions the court refused to disturb the forum selected by the plaintiff. The matter of venue is not a discretionary decision of the trial court but is based on federal statutes and substantive law.

That the lower court's decision is a legal aberration and should be eradicated is shown by the later decision of *Thornwell v. U.S.*, 471 F.Supp. 344 (1979) in the District of Columbia Circuit which upheld venue in similar circumstances. Where events having "operative significance in the case" occur within the forum district venue will be allowed. *Thornwell, supra,* also relied on *Conley v. Gibson,* 355 U.S. 41-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). This view has also been supported in *Allis-Chalmers Corp. v. Friedkin,* 481 F.Supp. 1256, 1265 f.n. (M.D. Pa. 1980); *Gold Eagle Co. v. Li,* 486 F.Supp. 201 (N.D. Ill. 1980); and *Florida Nursing Home Ass'n. v. Page,* 616 F.2d 1355 (5th Cir. 1980).

That the forum district selected by plaintiffs should not be disturbed was stated in *Lamont v. Haig, supra,* by Chief Judge Bazelon who was also one of the three judges on Petitioners' Appellate Panel. It is thus all the more inexplicable why the appellate court would reverse itself on a major issue by indirection in refusing to render a written opinion either vindicating or supporting its previous decision in *Lamont.*

## XII.
## PETITIONERS WERE DENIED BENEFIT OF "LONG ARM" PROVISIONS OF DISTRICT OF COLUMBIA CODE §13-423 AS HOLDING RESPONDENTS FOR VENUE.

The lower court decision denies venue for Reynolds, McLean and GPRL on the basis that no control is shown over Sea-Land (where venue is unquestioned), says that

overt action within the forum district was not shown and denied that this district was the place of injury for plaintiffs. To reach this decision the Court had to reject the allegations of plaintiffs before any discovery had been allowed which denied plaintiffs the safeguards in this respect assured to them by *Conley v. Gibson, supra.*

The decision also conflicted with *American Mail Lines, Ltd. v. F.M.C.*, 164 U.S. App. D.C. 66, 503 F.2d 157, 166 (C.A.D.C. 1974), *cert. den.* 419 U.S. 1070, which said that R.J. Reynolds "possessed . . . extensive power to control USL and Sea-Land . . .". Tortious injury was caused Petitioners by Reynolds and McLean both by Sea-Land as agents and directly by Mr. Malcolm McLean in his direction of the work of the conspiracy done in Washington, D.C., i.e., the preparation of the agreements and legal documents. The injury caused by the rejection of their loan application by the Maritime Administration also occurred within the District of Columbia thus establishing venue for all Respondents under § 13-423.

## CONCLUSION

The issues of this case are far more important than the case itself. Is there no legal protection against a state or territorial government that decides to monopolize transport between it and other states on a unilateral basis and deprive those states of direct ocean services? Does the Commerce Clause of the Constitution protect other states from such rapacious acts? Can a state government operate in commerce completely immune to federal law? Does Puerto Rico have powers to legislate other than those granted by Congress under the Constitution?

Specifically it is the people of the Commonwealth of Puerto Rico who need protection from the evils of a monopolistic shipping operation which needs $500 million worth of new ships to be provided by the public debt of the Commonwealth. No private shipping company can enter the service in competition with the government and thus provide the capital for these ships that is needed. Thus, one of the United States' largest offshore customers is denied the benefits of private shipping and new enterprise. The impact on the Puerto Rico economy is obvious.

Petitioners have been denied access to the Puerto Rico trade since 1973. Failure to reverse this decision will permanently stop Petitioners – and all other potential competitors – from entering the service. It will be another blow to efforts to strengthen private shipping in the face of local governmental policy to invade the commercial area.

The effects will not be limited to shipping alone. Perhaps the greatest immediate danger of this decision will be to truck lines, railroads and even air lines as these areas offer the greatest temptation especially to the states already having state-controlled port areas.

Because of the critical importance of the constitutional issues involved, to say nothing of the multi-billion dollar transportation industry which is so vitally affected, the decision of the court below should not be allowed to stand.

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted and that summary reversal should issue.

Respectfully submitted,

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November 25, 1980

# APPENDIX

# APPENDIX A

## ORDER AND MEMORANDUM OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1435

CARIBE TRAILER SYSTEMS, INC.
and JOHN R. IMMER,

Plaintiffs,

v.

PUERTO RICO MARITIME SHIPPING
AUTHORITY, et al.,

Defendants.

### ORDER

Upon consideration of defendant's motion to dismiss and for summary judgment, the memorandum in support thereof, the opposition thereto, the arguments of counsel, and the entire record in this case, it is by the Court this 19th day of April, 1979,

ORDERED that the motion of defendants R. J. Reynolds Industries, Inc., McLean Industries, Inc., and G Gulf-Puerto Rico Lines, Inc., to dismiss the complaint for lack of subject matter jurisdiction be, and hereby, is granted; and it is further

ORDERED that the motions of defendants Puerto Rico Maritime Shipping Authority, Puerto Rico Ports Authority, Transamerica Trailer Transport, Inc., Puerto Rico Marine Managaement, Inc., T.K.M. Corporation,

Sea-Land Services, Inc., American Union Transport, Inc., Trans Ocean Transportation Executive Management, Inc., and Sun Shipbuilding & Dry Dock Co. for summary judgment be and hereby are granted.

/s/ Oliver Gasch
Judge

## MEMORANDUM

This is an action to recover treble damages for alleged violations of sections 1, 2, and 3, of the Sherman Antitrust Act.[1] The basis of the complaint is an alleged conspiracy by twelve private and governmental entities to create a monopoly in ocean transportation between the East Coast and Gulf ports of the United States and the ports of Puerto Rico. Presently before the Court are the motions of ten defendants to dismiss the complaint on grounds of improper venue and lack of personal jurisdiction, and the motions of nine defendants for summary judgment on the ground that their conduct is immunized from antitrust liability under the state action doctrine recognized in *Parker v. Brown*, 317 U.S. 341 (1943). For For the reasons discussed below, the Court concludes that defendants' motions should be granted.

## FACTUAL BACKGROUND

Plaintiff Caribe Trailer Systems, Inc., ("Caribe") is a Puerto Rico corporation with its principal place of business in Washington, D.C. John R. Immer is the principal owner and chairman of the board of Caribe. Caribe was organized for the purpose of engaging in ocean transportation between East Coast and Gulf ports of the continental United States and the ports of Puerto Rico, but its activities never became operational. Plaintiffs contend that because of defendant's alleged antitrust violations, plaintiffs were unable to obtain financing to commence their operations and therefore were prevented from competing in the Puerto Rico trade. They seek a

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[1] 15 U.S.C. §§ 1-3 (1976).

permanent injunction against defendants' activities as well as treble damages, costs, and attorneys fees.

Each defendant named in this lawsuit had some involvement in the creation or operation of the Puerto Rico Maritime Shipping Authority ("PRMSA"), a government agency organized by the Commonwealth of Puerto Rico in 1974 to operate Puerto Rico's maritime transportation system. Because of its small size, insular postion, and limited natural resources, Puerto Rico has difficulty in maintaining a self-sufficient economy and is dependent on external trade for economic and social development. Ocean transportation carries more than ninety-eight percent of its external trade and as a result, ocean freight costs exert a potentially disruptive influence over all aspects of Puerto Rico's economy. Trade between East Coast and Gulf ports represents the major avenue of traffic between Puerto Rico and the mainland United States and accounts for approximately eighty-five percent of all dry cargo transported and over seventy percent of Puerto Rico's total external trade.

Because of the island's dependence on ocean transport, the Governor of Puerto Rico in 1973 established a commission to determine whether the Commonwealth should take steps to acquire the vessels then employed by commercial steamship companies in the Puerto Rico trade. This acquisition was intended to assure the availibility of vessels and to maintain price stability with respect ot transportation costs. Following negotiations with the three major carriers, the commission proposed legislation that would establish a nonstock public corporation to own or lease the vessels and equipment necessary to conduct the Mainland-Puerto Rico tade. On June 10, 1974, the Commonwealth legislation enacted this proposal as Act 62 and created the Puerto Rico Maritime

Shipping Authority as a governmental instrumentality to operate Puerto Rico's maritime transportation system.[2]

PRMSA, which is incorporated in Puerto Rico, consists of a governing board of seven members, all of whom are residents of Puerto Rico, appointed by the Governor with the advice and consent of the Puerto Rico Senate. Its operations are exempt from taxation and from all fees required for the prosecution of judicial proceedings. The Statement of Motives contained in Act 62 expresses the intent of the Puerto Rico legislature that PRMSA acquire and operate shipping lines and terminal facilities as a public service, and, in doing so, that it not be subject to the antitrust laws or any other limitations that would hinder its legislative goal.[3]

Following its organization, PRMSA acquired the rights to eleven ships and to various maritime transportation facilities from the three major carriers that served the Puerto Rico trade: Seatrain, Inc.,[4] and defendants Sea-Land Service, Inc. ("Sea-Land"), and Transamerican Trailer Transport, Inc. ("TTT"). The acquisition of these assets occurred in the following manner. Defendant American Union Transport, Inc., ("AUT"), a 63.3% shareholder in TTT, and defendant Sun Shipbuilding & Dry Dock Co. ("Sun Ship"), a 30% shareholder, directly conveyed their interests in TTT to PRMSA. TTT has since become a dormant corporation because PRMSA

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[2]Act of Puerto Rico Maritime Shipping Authority, Act No. 62 (June 10, 1974), *see* Exh. A in Appendix to Puerto Rico Defendants' Motion to Dismiss the Complaint.

[3]*Id. See also* Affidavit of Roberto Jugo D'Acosta in support of Puerto Rico Defendants' Motion to Dismiss the Complaint, at ¶2.

[4]Seatrain is not named as a defendant to this action.

operates its assets under PRMSA's own name and its officers and directors are the same as PRMSA's.

The vessels owned by Sea-Land were transferred through a similar transaction. Sea-Land and Gulf-Puerto Rico Lines ("GPRL") are both wholly owned subsidiaries of defendant McLean Industries, Inc. ("McLean"). McLean is a holding company which in turn is wholly owned by defendant R.J. Reynolds Industries ("Reynolds"). McLean and Reynolds conveyed their interests in Sea-Land to PRMSA.

Before these transfers were effected, the Commonwealth of Puerto Rico sought a business review letter from the Antitrust Division of the Department of Justice with respect to PRMSA and the proposed acquisition.[5] Although the acquisition would give PRMSA control over ninety percent of then-existing ocean shipping services, the Antitrust Division granted favorable clearance on July 22, 1974.[6]

PRMSA has an ongoing contactual relationship with defendant Puerto Rico Marine Management, Inc. ("PRMMI"), a Delaware corporation that provides operational direction for PRMSA's vessels and is responsible for manning, husbanding, docking, loading and unloading, and booking and soliciting cargo. PRMMI is paid a management fee for these services. PRMMI was organized in 1974 as a wholly owned subsidiary of McLean. On January 15, 1976, McLean entered into a stock purchase

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[5]Motion of Defendant Sun Shipbuilding & Dry Dock Co. to Dismiss Complaint, Exh. B.

[6]*Id.*, Exh. C, Letter of Thomas E. Kauper, Assistant Attorney General, Antitrust Division, Department of Justice.

agreement with defendant TKM Corporation (TKM) under which TKM acquired all the sotck of PRMMI. Defendant Trans Ocean Transportation Executive Management, Inc. ("TOTEM") also has managed cargo vessels on behalf of PRMSA.

The final defendant named in this action is the Puerto Rico Ports Authority ("PRPA"), an agency of the Puerto Rico government with broad responsibility for maritime matters.[7] One of the major functions of the PRPA is to supervise the port of San Juan, the second largest containership port in the world, by assigning vessels to suitable berths, entering into terminal leases with steamship operators, and managing dock facilities. A director of PRPA headed the commission that recommended creation of PRMSA.

On March 13, 1978, plaintiffs instituted the present lawsuit, charging each of the twelve defendants with conspiracy, monopoly, and restraint of trade in violation of sections 1, 2, and 3 of the Sherman Antitrust Act, 15 U.S.C. § 1-3. Specifically, plaintiffs allege that defendants secretly discussed and determined that maritime transportation between Puerto Rico and the mainland should be operated as a monopoly and devised a plan for achieving this goal, which included formation of PRMSA.[8]

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[7]PRPA was created by an act of the Puerto Rico Legislature on May 7, 1942. P.R. Laws Ann. tit. 23, §§331 *et seq.* (1955). Its purpose, as set out in its enabling statute, is ". . . to develop and improve, own, operate, and manage any and all types of transportation facilities and air and maritime services in, to, and from the Commonwealth of Puerto Rico . . . ." *Id.* §336.

[8]*See* More Definite Statement of Paragraph 22 of Plaintiffs' Complaint.

Presently before the Court are motions to dismiss for improper venue and lack of personal jurisdiction filed by defendants, Reynolds, McLean, GPRL, PRMSA, PRPA, TTT, PRMMI, TKM, AUT, and TOTEM. All defendants with exception of Reynolds, McLean, and GPRL have joined in a motion to dismiss, or in the alternative for summary judgment[9] originally filed by PRMSA, PRPA, and TTT (the "Puerto Rico defendants"). The governmental entities seek dismissal on the ground that their actions were immune from liability for antitrust violations under the *Parker* doctrine. The private defendants have moved to dismiss on the ground that their actions were compelled by the Commonwealth of Puerto Rico and therefore also exempt from liability under *Parker*.

*VENUE*

Although this complaint alleges that the defendants have engaged in a "combination and conspiracy" in violation of the Sherman Act, plaintiffs must establish venue as to each defendant separately. 15 Wright, Miller & Cooper, *Federal Practice & Procedure* § 3818, at 116 (1969); *see Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 291 F. Supp. 252, 262, (C.D. Pa. 1968). In the present case, plaintiffs attempt to establish venue in the District of Columbia on the alternative grounds that defendants transacted business in this district and that the cause of action arose in this district.

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[9] Because the motions to dismiss are supported by affidavits and other exhibits, the Court will treat them as motions for summary judgment under Fed. R. Civ. P. 56.

Venue over corporate defendants in antitrust actions may be established under the special antitrust venue provisions contained in sections 4 and 12 of the Clayton Act[10] or under the general federal venue provisions.[11] Each of the moving defendants claims that none of the bases for venue contained in these statutes are satisfied in the present case.

Section 4 provides for venue in any district in which the defendant resides, is found, or has an agent. A corporation resides in a district only if it is incorporated or licensed to do business in that state, or has its principal place of business there. 14 Von Kalinowski, *Antitrust Laws and Trade Reg.* § 104.04[4] (1978). The affadavits submitted by the moving defendants in support of their motions to dismiss establish that none of these defendants are incorporated or licensed to do business in the District of Columbia, nor do they directly conduct business or have their principal place of business here.

Section 12 permits venue in any district in which a corporation is an inhabitant, may be found, or transacts business. A corporation is said to be an inhabitant of the state of its incorporation. *Aro Mfg. Co. v. Automobile Body Research Corp.*, 352 F.2d 400, 404 (1st Cir. 1965), *cert denied*, 383 U.S. 947 (1966). A corporation is found where it has "presence and continuous local activities within the district." *Fox-Keller, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 338 F. Supp. 812, 815 (E.D. Pa. 1972). The moving defendants do not satisfy either of these requirements.

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[10] 15 U.S.C. §§ 15, 22 (1976).

[11] 28 U.S.C. § 1391 (1976).

Section 12 also permits a corporation to be sued in any district in which it "tranacts business." This standard was enacted to enlarge the jurisdiction of the federal courts with respect to venue by substituting "practical business considerations for the previous hair-splitting legal technicalities encrusted on the 'found - 'present' - carrying-on-business' sequence . . . " *United States v. Scophony Corp.*, 333 U.S. 795, 808 (1948). "Transacting business" for the purpose of section 12 has a meaning independent of definitions which courts have given the same phrase in construing other statutes. The test is whether the corporation is doing business in the district of any substantial character, even if its business is entirely interstate in character and is transacted by agents who do not reside within the district. *Id.* at 807; *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 372-73 (1927).

Whether a defendant had transacted business is largely a factual question to be determined in each case. In making this determination, courts look for tangible manifestations of doing business.[12] Such manifestations are absent here. None of the moving parties has officers, employees, or agents within the district.[13] None has

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[12] *E.g., Brandt v. Renfield Importers, Ltd.*, 278 F.2d 904, 909-11 (8th Cir.), *cert. denied*, 364 U.S. 911 (1960) (being subject to state regulation, licensing, or taxes constitutes doing business); *Frey & Son v. Cudahy Packing Co.*, 228 F. 209, 212-13 (D. Md. 1915) (maintaining tangible property within the state, such as real estate, inventory, bank accounts, or corporate records constitutes doing business); *Magnetic Eng'r & Mfg. Co. v. Dings Magnetic Separator Co.*, 86 F. Supp. 13, 16 (S.D.N.Y. 1949), *modified*, 178 F.2d 866 (2d Cir. 1950) (employing persons within the district constitutes doing business).

[13] Plaintiffs argue that various defendants retained economic and marine consultants, attorneys, and law firms in Washington,

[footnote continued]

offices or owns property here, nor do they maintain corporate records, telephones, telephone listings, or bank accounts. Plaintiffs' complaint does not suggest any other activity of a similar nature that might bring defendants within the transacting business standard.

Some courts have held that a corporation may be found to be transacting business for venue purposes in the district in which coconspirators were found and where the conspiracy had its impact.[14] In *Giusti v. Pyrotechnic Industries, Inc.*,[15] the United States Court of Appeals for the Ninth Circuit held that because all conspirators are agents for each other, the presence of one defendant in a district can subject his coconspirators to suit in that district as their agent. This theory, however, has been rejected by other courts[16] and this Court

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who assisted in the creation of PRMSA. The Court concludes that these independent contractors were not employees or agents for venue purposes and contracting for legal and economic consultation services does not constitute "transacting business" in a jurisdiction. *Control Data Corp. v. Carolina Power & Light Co.*, 274 F. Supp. 336 (S.D.N.Y. 1967) (North Carolina corporation's engaging engineering and technical consultants in New York, negotiating with investment houses, and retaining legal counsel did not constitute "doing business").

[14] *E.g., Ross-Bart Port Theatre v. Eagle Lion Films, Inc.*, 140 F. Supp. 401, 402 (E.D. Va. 1954); *DeGolia v. Twentiety Century-Fox Film Corp.*, 140 F. Supp. 316, 318 (N.D. Cal. 1953); *Don George Inc. v. Paramount Pictures, Inc.*, 111 F. Supp. 458, 462 (W.D. La. 1951), *mod. on other grounds*, 145 F. Supp. 523 (W.D. La. 1956).

[15] 156 F.2d 351, 354 (9th Cir.), *cert. denied*, 356 U.S. 936 (1958).

[16] *E.g., Bertha Bldg. Corp. v. National Theatres Corp.*, 248 F.2d 833, 836 (2d Cir. 1957), *cert. denied*, 356 U.S. 936 (1958); *Redmond v. Atlantic Coast Football League*, 359 F. Supp. 666, 672 (S.D. Ind.), *aff'd mem.*, 478 F.2d 1405 (7th Cir. 1973);

[footnote continued]

concludes that its application here would be contrary to the principle that venue must be established for each defendant separately. *See* 15 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3818.

With respect to defendants Reynolds, McLean, and GPRL, plaintiffs do not contend that these entities directly transact business in this district but instead argue that venue is properly laid against them here because of their relationship with defendant Sea-Land. There is no dispute that venue exists in the District of Columbia for Sea-Land because it is licensed to do business here. Sea-Land and GPRL are wholly owned subsidiaries of McLean, a holding company, which in turn is wholly owned by Reynolds. Plaintiffs allege that the management and business operation of these four defendants are so commingled and integrated that venue laid against Sea-Land lies against the moving defendants. In support of this argument, plaintiffs have attempted to detatil the various degrees of participation by Reynolds, Sea-Land, McLean, and GPRL in the sale of Sea-Land's assets to PRMSA.[17]

When a parent and its subsidiary are joined as defendants in an antitrust action, venue over the parent may be based on the local activities of its subsidiary "if the relationship between that parent and the subsidiary is such that the subsidiary may be considered the agent

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*Occidental Petroleum Corp. v. Buttes Gas & Oil Corp.*, 331 F. Supp. 92, 96-97 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972). *See also Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953).

[17] *See* Plaintiffs' Opposition to Motion to Dismiss Complaint filed by R.J. Reynolds Indus., Inc., McLean Indus., Inc., and Gulf Puerto Rico Lines, Inc., at 4-7 and Exh. A-B.

or the alter ego of the parent." *Audio Warehouse Sales, Inc. v. U.S. Pioneer Electronics Corp.*, 1975-1 Trade Cas. ¶ 60,213 (D.D.C. 1975). Generally when the subsidiary maintains a separate legal identity, its presence in the district will not be sufficient to bring the foreign parent corporation within the ambit of section 12. *Phillip Gall & Son v. Garcia Corp.*, 340 F. Supp. 1255, 1259 (E.D. Ky. 1972).

It is also generally accepted that mere ownership of stock in a subsidiary corporation transacting business in a district does not establish venue against the parent corporation. *See, e.g., O.S.C. Corp. v. Tobshiba America, Inc.*, 491 F.2d 1064, 1066 (9th Cir. 1974). In order for the parent corporation to be amenable to suit, it must exercise a control relationship over its subsidiary. *See Tiger Trash v. Browning-Ferris Indus., Inc.*, 560 F.2d 818, 822 (7th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978). This concept of control is a method of determining whether the ownership of the subsidiary is a mere investment or is an alternative means of transacting business by the parent corporation.[18]

Plaintiffs here have alleged that Reynolds, McLean, Sea-Land and GPRL represent an integrated and interlocking management scheme so that the three moving defendants were transacting business in this jurisdiction through their relationship with Sea-Land. Applying the principles discussed above to the facts of this case makes it clear that the transacting business requirement is not

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[18] *See Hitt v. Nissan Motor Co.*, 399 F. Supp. 838, 841 (S.D. Fla. 1975) (100% ownership by parent, exchange of officers and employees, and common directors supported finding that parent controlled subsidiary for venue purposes).

satisfied. The essential element required before a court can find that one corporate entity was transacting business through an alter ego is control over the conduct that allegedly violated the antitrust laws. *Call Carl, Inc. v. B.P. Oil Corp.*, 391 F. Supp. 367, 371 (D. Md. 1975); *see Grappone, Inc. v. Subaru of America, Inc.*, 403 F. Supp. 123, 131 (S.D.N.Y. 1975). With respect to GPRL, which along with Sea-Land is a cosubsidiary of McLean, there has been not even a suggestion of how GPRL could exercise the required control relationship.

Even though Sea-Land is a wholly owned subsidiary of McLean, which is owned by Reynolds, the separate identities of the subsidiaries are maintained and the evidence indicates that each carries on its activities without having daily business affairs controlled by the parent. *See In re Chicken Antitrust Litigation*, 407 F. Supp. 1285 (N.D. Ga. 1975). There has been no evidence that the parent exerted the required degree of control over its subsidiary or was involved directly in its operations and policy decisions. *See Dobbins v. Kawasaki Motors Corp.*, 1974-1 Trade Cas. ¶ 75,000 (D. Ore. 1974). Although there is some interlocking management between the three entities,[19] the Court concludes that the control relationship is absent and venue over GPRL, McLean, and Reynolds cannot be predicated on the existence of venue in this jurisdiction over Sea-Land.

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[19] For example, Malcolm McLean, the president of McLean, also serves as Chairman of the Board of Sea-Land and as a member of the Board of Directors of Sea-Land. Stock ownership and interlocking directorates, however, have been found insufficient to establish venue under the transacting business standard when control over daily business activities is lacking. *See Hayashi v. Sunshine Garden Prod., Inc.*, 285 F. Supp. 632 (D. Wash. 1967).

The final method of establishing venue in antitrust actions is under section 1391 of the general federal venue statutes. Section 1391(b) is an important section for private antitrust plaintiffs because it allows them to establish venue in the judicial district in which the claim arose, a choice of venue not afforded under the venue provisions of the Clayton Act.[20] In determining whether a particualr jurisdiction is actually the district in which the claim arose, it is necessary to consider whether the parties had a significant relationship to the district. This depends upon the occurence in the district of events such as "sales, injury, conspiratorial meetings, or overt acts pursuant to such meetings." *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 309 F. Supp. 1053, 1056 (E.D. Pa. 1969).

In making this determination, a "weight of contacts" test should be used. 14 Von Kalinowski, *Antitrust Laws & Trade Reg.* § 104.04[2] (1978). This requirement can be satisfied, for example, if significant sales causing substantial injury to plaintiffs occurred in the district or if some other overt act took place that was a "significant and substantial" element of the offense. *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 291 F. Supp. 252, 261 (E.D. Pa. 1968).

Plaintiffs attempt to satisfy the weight of contacts test by alleging that a number of conspiratorial meetings took place in the District of Columbia and that certain legal

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[20] Although there has been some judicial uncertainty whether the general federal venue statute expands special venue provisions, it is now generally recognized that these provisions are available absent contrary statutory restrictions. *See Pure Oil Co. v. Juarez*, 384 U.S. 202, 207 (1966) (Jones Act venue provision expanded by later general venue statute 28 U.S.C. § 1391 so that corporation may also be sued in district where it does business).

documents relating to the sale of assets to PRMSA were drafted here.[21] Some courts have held that conspiratorial meetings may be sufficient to establish venue under section 1391 as to each defendant who was present there. *See Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 429 F. Supp. 139 (N.D. Ill. 1977). Before such a rule can be applied, however, it is necessary to find that such meetings took place, that they involved a violation or an attempted violation of the antitrust laws, and that each of the moving defendants participated in them. *ABC Great States, Inc. v. Globe Ticket Co.*, 310 F. Supp. 739, 743 (N.D. Ill. 1970).

Such findings cannot be made here. Although some defendants met with counsel in this jurisdiction and had other contacts here, the Court concludes that such meetings, even if viewed in the light most favorable to plaintiffs, did not represent a violation or attempted violation of the antitrust laws. To the extent that such meetings sought to achieve the passage of Act 62, they were exempted from antitrust liability under the *Noerr-Pennington* doctrine.[22] To the extent they were related to the sale of assets to PRMSA, the state action exemption discussed below would preclude liability.

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[21] *See* affidavit of John R. Immer, Exh. C to Plaintiffs' Opposition to Defendant's Motion to Dismiss, or, in the Alternative, for Summary Judgment. Plaintiffs also describe meeting and other contacts between various defendants and the Federal Maritime Commission but such governmental contacts by federally regulated industries do not constitute "transacting business" in the District of Columbia. *Fandel v. Arabian American Oil Co.*, 345 F.2d 87 (D.C. Cir. 1965).

[22] *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *see* pages 30-31 *infra*.

As a final argument, plaintiffs urge that their claim arose within the meaning of section 1391 because they suffered financial injury in this jurisdiction. At least one court has rejected the weight of the contacts test and held that venue can be established under section 1391 in the judicial district in which the injured plaintiff operated. *Iranian Shipping Lines, S.A. v. Moraties,* 377 F. Supp. 644 (S.D.N.Y. 1974); *Albert Levine Assoc. v. Bertoni & Cotti, S.P.A.,* 314 F. Supp. 169 (S.D.N.Y. 1970).

To hold that a cause of action necessarily arose in the district in which the plaintiff was injured is a "simplistic rationale to which antitrust actions are not susceptible." *Redmond v. Atlantic Coast Football League,* 359 F. Supp. 666, 669 (S.D. Ind.), *aff'd mem.,* 478 F.2d 1405 (7th Cir. 1973). The Court agrees with this conclusion and holds that plaintiff's allegations of injury in this district will not support a finding of venue here. To hold otherwise would be tantamount to extending venue under section 1391 to any district in which the plaintiff resides, a result clearly not contemplated by the rules. *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.,* 291 F. Supp. 252, 260 (E.D. Pa. 1968).

After careful review of the facts of this case, the Court concludes that, despite their vigorous efforts, plaintiffs have failed to establish that venue exists in this jurisdiction over defendants Reynolds, McLean, and GPRL. Although venue is also probably deficient with respect to the other moving defendants, in the interests of judicial economy and achieving a resolution on the merits, the Court will not address these motions but will instead consider the alternative motions for sum-

mary judgment based on the state action exemption to the antitrust laws.

*STATE ACTION EXEMPTION*

The governmental and remaining private defendants have moved for summary judgment[23] on the ground that the conduct at issue in this lawsuit is immune from liability under the state action exemption to the antitrust laws. Because the immunity of private parties derives from a determination that the conduct of the state entities is so immunized, it is first necessary to consider the applicability of the state action exemption to Puerto Rico defendants.

The principle that state action is beyond the scope of federal antitrust laws stems from the decision of the Supreme Court in *Parker v. Brown,* 317 U.S. 341 (1943). In *Parker* the Court rejected a producer's claim that a state agricultural marketing program established pursuant to statute violated the Sherman Act. Noting that the state had adopted the program to restrict competition and maintain prices, the Court held that Congress intended the Sherman Act to restrain private anti-competitive conduct and not actions taken by a state or its agencies in furtherance of a legislative mandate. There is no dispute that Puerto Rico is a state for purposes of applying the *Parker* doctrine. *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.,* 351 F. Supp. 1153, 1229 (D. Hawaii 1972), *mod. on other grounds,* 518 F.2d 913 (9th Cir. 1975).

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[23]Defendant Sea-Land has moved for partial summary judgment on any issues of antitrust liability arising out of its sale of certain operational assets to PRMSA.

Defendants argue that the actions of a state instrumentality mandated by clear legislative authority are immune from antitrust liability under *Parker.*[24] They note that in this case the Puerto Rico legislature specifically mandated its instrumentality, PRMSA, to take over and operate the shipping trade between the East Coast and Gulf ports of the United States and Puerto Rico. PRMSA carried out the mandate by acquiring and operating ships in this trade, and defendants argue that as a result, the PRMSA acquisition and operation of the steamships are immune from antitrust liability.

*A. State Instrumentalities.*

After a long period of silence, the Supreme Court in recent years has given renewed attention to the scope of the *Parker* doctrine[25] and its decisions have been the sub-

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[24]The terms "state action exemption" and "antitrust immunity" are frequently used to refer to the *Parker* doctrine, but these terms are less than accurate in view of the Supreme Court's statement that "[t]he Sherman Act makes no mention of the state as such and gives no hint that it was intended to restrain state action." 317 U.S. at 351; *see Kurek v. Pleasure Driveway & Park Dist.*, 557 F.2d 580, 587 n.5 (7th Cir. 1977) (Sherman Act was not intended to apply to state-mandated activities but courts nonetheless utilize single-word shorthand references of "exemption" or "immunity").

[25]*See City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). Prior to these decisions there had been a 32-year period in which the Supreme Court consistently declined to review cases involving the *Parker* doctrine. *See, e.g., George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970); *E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth.*, 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966).

ject of extensive legal commentary.[26] The most recent case involving the doctrine is *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), in which the Court held municipalities could not invoke the *Parker* doctrine in a suit for antitrust violations allegedly committed by them in connection with ownership of public utilities.

In refusing to find antitrust immunity, a plurality of the Court held that municipalities, like other state instrumentalities, are not exempt from application of the antitrust laws simply by virtue of their status as governmental entities. *Id.* at 413. The plurality stated: "We therefore conclude that the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." *Id.*[27]

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[26] *E.g.*, Handler, *The Current Attach on the* Parker v. Brown *State Action Doctrine*, 76 Colum. L. Rev. 1 (1976); Kennedy, *Of Lawyers, Lightbulbs, and Raisins: An Analysis of the State Doctrine under the Antitrust Laws*, 74 Nw. U. L. Rev. 31 (1979); Verkuil, *State Action Doctrine, Due Process and Antitrust: Reflections on* Parker v. Brown, 75 Colum. L. Rev. 328 (1975); Note, *Anti-Trust Law and Municipal Corporations*, 65 Geo. L.J. 1547 (1977).

[27] Chief Justice Burger, who provided the fifth vote for affirmance of the Fifth Circuit's decision in *City of Lafayette*, did not join in this portion of the opinion but his concurrence indicates that he regarded the plurality's approach as the minimum to be required of a state instrumentality, which he felt should demonstrate that it is acting in a proprietary capacity before it is allowed the protection of *Parker*. 435 U.S. at 418 (Burger, C.J., concurring); *see Star Lines Ltd. v. Puerto Rico Maritime Shipping Authority*, 451 F. Supp. 157, 165 (S.D.N.Y. 1978).

*City of Lafayette* thus establishes a two-fold inquiry that must guide the Court in applying the *Parker* doctrine. The first consideration is whether the state, acting as sovereign, has required its agency or instrumentality to engage in the particular form of anticompetitive conduct. This is not to suggest that the *Parker* doctrine permits each state legislature to determine the extent to which a particular government agency under its control should be exempt from the antitrust laws. As the Court in *Parker* indicated, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. at 351. The decision did recognize, however, the overriding policy of federalism, namely, that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*

In order for *Parker* to apply, it is not necessary for a state legislature to direct its instrumentality to perform a specific anticompetitive act. The threshold requirement for *Parker* immunity is satisfied if the legislature directs its instrumentality to engage in a particular type of activity. As the plurality opinion in *City of Lafayette* stated:

> While a subordinate governmental unit's claim to *Parker* immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found 'from the authority given a govern-

> mental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'

433 U.S. at 415.

In this case, there is no dispute that PRPA and PRMSA are agencies of the Commonwealth of Puerto Rico.[28] The Statement of Motives of Act 62, which established PRMSA, contains a clear expression of legislative intent:

> The Legislature of Puerto Rico intends that this instrumentality acquires and operates shipping lines and terminal facilities as a public service, and that in doing so, it shall not be subject to the antitrust laws nor any other limitation that could hinder the effective discharge of the endeavor that this act has imposed on the public instrumentality hereby established.

In addition, section 25 of the Act repeats the intention of the legislature that PRMSA, in carrying out its mandate to provide efficient, reliable, and economic maritime services, not be subject to antitrust laws:

> *Conflicting Laws Inapplicable.* Insofar as the provisions of this act are in conflict with the provisions of any other law, or parts thereof, the provisions of this act shall prevail. Specifically, and without otherwise limiting the generality of the foregoing, it is intended by this act that the Antitrust Laws shall not be applicable to any action of the Authority taken pursuant to the provisions hereof.

A recent case construed this statute under the criteria set out by the Supreme Court in *City of Lafayette*. In

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[28] *See* P.R. Laws Ann., tit. 23, §333(b) (1955); Act, *supra* note 2, §4.

*Star Lines, Ltd. v. Puerto Rico Maritime Shipping Authority*, 451 F. Supp. 157 (S.D.N.Y. 1978), a Liberian corporation sued PRMSA for alleged antitrust violations arising from the short-term lease of a PRMSA vessel not needed in the Puerto Rico trade to plaintiff's competitor in the Persian Gulf. In denying PRMSA's motion to dismiss the complaint for failure to state a claim upon which relief can be granted, the district court held that the transaction in question – leasing a ship to others to operate in foreign trade unrelated to Puerto Rico – was not performed pursuant to any governmental policy to displace competitive market forces in the area. *Id.* at 166. It found that "the connection between the legislative grant of power to PRMSA and its use of that power under the facts of this case is simply 'too tenuous to permit the conclusion that the entity's intended scope of activity included such conduct.' " *Id.* at 167 (*quoting City of Lafayette v. Louisiana Power & Light Co.*, 532 F.2d 431, 434 (5th Cir. 1976), *aff'd* 433 U.S. 389 (1978)).

The Court noted, however, that if the challenged conduct were such that it could reasonably have been contemplated by the legislature as necessary to ensure complete and reliable carrier service or proper maintenance of port facilities, it could withstand attack under the antitrust laws. It stated:

> Certainly if the conduct being challenged here were that PRMSA had reduced competition in the Puerto Rican-East Coast trade by acquiring a majority of those vessels suitable for engaging in that trade, or that PRMSA had contracted with a single private company to control Puerto Rico's port facilities, PRMSA's claim to antitrust immunity would be on much stronger ground.

*Id.* (footnotes omitted).

Plaintiffs do not deny that the Puerto Rico legislature not only intended, but in fact authorized and mandated, state control of all shipping lines operating between Puerto Rico and the Eastern and Gulf ports of the United States. Neither do they dispute that the legislature intended to immunize the acquisition and operation of the shipping lines from federal antitrust laws.[29] Instead they urge that the *Parker* doctrine is inapplicable to this situatin because the immunized state conduct consisted of acts outside the territory over which the state had legislative jurisdiction.

In support of this argument, plaintiffs rely on one of the few cases to raise this isue, *Ladue Local Lines, Inc. v. Bi-State Development Agency,* 433 F.2d 131 (8th Cir. 1970). *Ladue* involved a political entity created by the legislatures of Illinois and Missouri to acquire and operate a public transit system in eastern Missouri and western Illinois. Plaintiff, a private company that engaged in bus transportation in the same area, brought an antitrust action alleging that defendant's monopolistic control of the public transportation market had destroyed its business by precluding it from bidding on and servicing schools and school systems. *Id.* at 132.

Affirming the district court's dismissal of the action, the court of appeals held that when a political body created by the legislatures of Illinois and Missouri was acting under Congressionally-approved authorization[30]

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[29] *See* Plaintiffs' Opposition to the Motion to Dismiss the Complaint by the Puerto Rican Defendants, at 2.

[30] Bi-State was organized pursuant to a compact entered into by the states of Illinois and Missouri. The consent of Congress to such compacts is required by Article I, Section 10, Clause 3 of the

[footnote continued]

to operate bus transportation facilities and that authorization was granted pursuant to a legislative policy that public interest would best be served by a unified public transportation sytem, the activity was not subject to the antitrust laws even though a monopoly was created. *Id.* at 137. Plaintiffs urge that in the absence of such interstate agreement, any unilateral attempt by one sovereign to displace competition in another jurisdiction will not survive scrutiny under federal antitrust laws and seek to apply this agreement to the situation here.

To the extent that plaintiff's argument suggests that a state's immunity under the antitrust laws is limited to its own territory, it ignores a central truth of the *Parker* doctrine. A necessary element of any violation of the federal antitrust laws is an effect on interstate commerce.[31] As commentators have noted, in a unitary economic system such as ours, jurisdiction under the Sherman Act should be presumed on the ground that every restraint "has the inherent tendency to affect interstate resource allocation and the interstate movement of goods and services in our national economy."[32]

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Constitution, which states in part: "No state shall, without the consent of Congress . . . enter into any agreement or compact with another state . . . ." The Bi-State compact was approved by the Act of August 31, 1950, Pub. L. No. 81-743, 64 Stat. 568.

[31] Sections 1 and 2 of the Sherman Act are applicable only to "trade or commerce among the several States." 15 U.S.C. §§1,2. Section 3 of the Sherman Act applies to contracts, combinations, or conspiracies "in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia and any State or States or foreign nations . . . ." 15 U.S.C. §3.

[32] P. Areeda and D. Turner, 1 *Antitrust Law* ¶232a, at 229-30 (1978).

The exemption created in *Parker v. Brown* for state action must be coextensive with the scope of the Sherman Act, and thus is applicable to the interstate effects of a particular form of state action. *Parker v. Brown* itself supports this analysis, for that case involved action by the State of California to raise and stabilize the price of raising, ninety-five percent of which were sold outside the state. 317 U.S. at 345. Plaintiffs' "extraterritoriality" argument is in direct conflict with the fundamental message of *Parker* that the entire Sherman Act, including its extraterritorial coverage, was never intended to restrain state action undertaken pursuant to a proper legislative mandate to displace competition.

In summary, the most recent judicial interpretations of the state action doctrine require that the anticompetitive conduct engaged in by a state instrumentality be undertaken pursuant to a governmental policy to displace competition with regulation or monopoly public service. Here the Puerto Rico legislature, in an attempt to ensure adequate carrier and passenger service between Puerto Rico and the mainland, specifically mandated its instrumentality PRMSA to take over and operate the shipping trade. PRMSA carried out that mandate by acquiring and operating the steamships in such trade. This conduct, which is the subject of plaintiffs' complaint, is immune from antitrust liability under the state action doctrine.

PRPA acted under a similar legislative mandate to operate the transport facilities of Puerto Rico and to establish rules and regulations for their use. This conduct was also undertaken in the exercise of a valid governmental function and is similarly immune from antitrust liability. *See E.W. Wiggins Airways, Inc. v. Massachusetts*

*Port Authority*, 362 F.2d 52, 55 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966).

*B. Private Defendants.*

The issue of the antitrust immunity of private parties did not arise in *Parker* because that case involved an equity suit against state officials. 317 U.S. at 344. Although there has been some judicial uncertainty regarding the reach of the *Parker* doctrine, it seems clear that a majority of the present Supreme Court believes that *Parker* is equally applicable to suits against private parties whose actions are compelled or regulated by the state.[33] The correctness of this interpretation becomes apparent by considering the facts of the original *Parker* case. In that instance, if the federal government or a private litigant could have enforced the antitrust laws against the raisin producers, effectuation of state policy would have been thwarted just as if the state action immunity were never granted. P. Areeda & D. Turner, 1 *Antitrust Law*, ¶ 212b, at 69 (1978); *see Trans-World Assoc. v. Denver*, 1974-2 Trade Cas. ¶ 75,293 (D. Colo. 1975).

In the present action the nongovernmental defendants maintain that their conduct is immune from antitrust liability because of the state action immunity applicable to PRMSA. The Court agrees with this interpretation, for it would be anomalous to hold that PRMSA, the state-sanctioned mechanism for acquiring control of the island's ocean transportation, was immune as the buyer

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[33] *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 603 (1976) (Burger, C.J., concurring in part); *id.* at 605, 613 n.5 (Blackmun, J., concurring in judgment); *id.* at 614-15 (Stewart, Powell and Rehnquist, JJ., dissenting).

of the assets of certain carriers and simultaneously to withhold such immunity from the selling carriers. Similarly defendants PRMMI, TKM, and TOTEM, whose involvement in this lawsuit arises from their operation and management of cargo vessels on behalf of PRMSA, cannot be held liable under the antitrust laws if PRMSA's conduct in operating the ships was immunized.

A similar conclusion regarding the immunity of private parties engaged in business enterprises with state instrumentalities has been reached by other courts. In *Trans-World Assoc., Inc. v. Denver, supra,* plaintiff sought to operate a rent-a-car concession at the city airport, but its application was denied on the ground that it was city policy to permit only five concessionaires to operate at any one time. The city and the existing concessionaires were named as defendants in an action alleging conspiracy and attempt to monopolize the airport car rental business. The Court dismissed the causes of action involving the city of Denver on the basis of the state action exemption and further held that "since the city is privileged to enter into negotiations and agreements, which might otherwise violate the Sherman Act, those with whom the cities contract are similarly entitled to anti-trust immunity." *Id.* at 97,900.[34]

Plaintiffs also appear to suggest that the actions of the private defendants in lobbying and advising the Puerto Rico government and legislature regarding the desirability

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[34] *See also Padgett v. Louisville & Jefferson City Air Bd.*, 492 F.2d 1258 (6th Cir. 1974) (per curiam); *Saenz v. University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973); *E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth.*, 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966); *Metro Cable Co. v. CATV of Rockford*, 375 F. Supp. 350 (N.D. Ill. 1974).

and organization of a state shipping authority precludes any claim that their actions were compelled and that, in the absence of such compulsion, defendants cannot claim immunity under *Parker.* Two recent Supreme Court cases have raised the possibility that a private party's right to antitrust immunity may depend upon whether the challenged actions were compelled by a state. In *Goldfarb v. Virginia State Bar,* the Court refused to extend antitrust immunity to Bar Association minimum fee schedules and offered as one of its reasons: "It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as sovereign." 421 U.S. 773, 792 (1975). Similar sentiments were expressed in *Cantor v. Detroit Edison Co.,* 428 U.S. 579 (1976). A program for providing light bulbs was originally proposed by the utility but was made mandatory by the state utility commission. Concluding that the option to have the program was the utility's and was not imposed by the commission, the Court determined that the defendant "exercised sufficient freedom of choice" for the Court to find that compulsion was absent. *Id.* at 593.

The role that compulsion should play in determining antitrust immunity is left unclear by these cases, which involve different forms of state action than the ones presented here. In *Goldfarb* and *Cantor* the Court recognized that neither adequate supervision nor state intent to displace antitrust enforcement could be demonstrated. It has been suggested that the presence or absence of compulsion is important because it provides evidence of state intent.[35] Compulsion establishes that the state

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[35] P. Areeda & D. Turner, *supra* note 32, ¶ 215b, at 96.

intends to displace the antitrust laws for otherwise the compulsion would be without purpose and effect. Similarly lack of compulsion suggests that intent to provide immunity does not exist. In this case there is clear independent evidence in Act 62 itself that antitrust immunity is intended. It is therefore unnecessary to look to the presence or absence of compulsion as evidence of intent.

Earlier Supreme Court decisions also establish that a court cannot require the absence of initiative or lobbying by a defendant before granting him immunity. The *Parker* case itself is proof to the contrary, for there, raisin producers initiated the procedure leading to state restrictions. Their representatives formulated the plan reviewed and approved by the California legislature and the plan took effect only upon a favorable referendum among raisin producers.

Plaintiffs' argument that compulsion is required is also refuted by the Supreme Court's decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), in which the Court held that, regardless of anticompetitive purpose or intent, a concerted effort by persons to influence lawmakers to enact legislation beneficial to themselves or detrimental to competitors was not within the scope of the antitrust laws. This decision is based on two principles. The first is that a contrary holding would impede the communication between citizens and their lawmakers, without which a representative democracy could not function. The second element is the threat to the constitutionally protected right of petition that would result from a con-

trary construction. *Id.* at 137-38.[36] Thus the actions of some private defendants in lobbying the Puerto Rico government prior to the formation of PRMSA does not preclude their claim to exemption from antitrust liability under the state action exemption.

PRMSA and PRPA have established that they are governmental agencies acting pursuant to a legislative mandate to displace competition with a public monopoly. As such, their actions in acquiring vessels and operating them in the United States-Puerto Rico trade, which form the basis of this complaint, are exempt from antitrust liability under the *Parker* doctrine. The conduct of the private defendants in selling vessels to PRMSA or in operating them on behalf of PRMSA is similarly immunized. Accordingly, the moving parties' motions for summary judgment are granted and this action is dismissed.

/s/ Oliver Gasch
Judge

Date: April 19, 1979

[36] *See also United Mine Workers v. Pennington*, 381 U.S. 657, 669-72 (1965). *Pennington* held that, regardless of the anticompetitive purpose or effect on small competing mining companies, the joint action of certain large mining companies and labor unions in lobbying the Secretary of Labor for legislation establishing a minimum wage for employees of contractors selling coal to the Tennessee Valley Authority and in lobbying the TVA to avoid coal purchases exempted from the legislation was not subject to antitrust attack. Cases subsequent to *Pennington* have emphasized that any contrary construction would pose a serious threat to first amendment freedoms. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707-08 (1962); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 516 (1972) (Stewart, J., concurring in judgment).

## APPENDIX B

**Per Curiam Decision of the United States Court of Appeals, July 3, 1980.**

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

[Filed Apr 23, 1979]

September Term, 1979

No. 79-1658

Caribe Trailer Systems, Inc.
John R. Immer, Appellants

v.

Puerto Rico Maritime Shipping
Authority, et al.

Appeal from the United States District Court for the District of Columbia.

Before: BAZELON, Senior Circuit Judge; WILKEY and WALD, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. While the issues presented occasion no need for any opinion, they have been accorded full consideration by the Court. See Local Rule 13(c). We are satisfied that the district court correctly identified the issues raised by the plaintiff as involving only violations of the Sherman Act. On those issues we are in agreement with the district court's disposition. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the district court's order filed April 23, 1979 is therefore affirmed.

*Per Curiam*
For the Court

/s/ George A. Fisher
Clerk

## APPENDIX C

**Decision of Panel and Court Rejecting Petitioners' Application for Rehearing, or in the Alternative Rehearing *En Banc*, August 29, 1980**

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

[Filed Aug. 29, 1980]

September Term, 1979

No. 79-1658

Caribe Trailer Systems, Inc.
John R. Immer, Appellants

v.

Puerto Rico Maritime Shipping
Authority, et al.

BEFORE: Bazelon, Senior Circuit Judge; Wilkey and Wald, Circuit Judges

ORDER

Upon consideration of appellants' (Caribe Trailer Systems, Inc, et al.) petition for rehearing, it is

ORDERED, by the Court, that appellants' aforesaid petition for rehearing is denied.

*Per Curiam*
FOR THE COURT
GEORGE A. FISHER

By: /s/ Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

[Filed Aug. 29, 1980]

September Term, 1979

No. 79-1658

Caribe Trailer Systems, Inc.
John R. Immer, Appellants

v.

Puerto Rico Maritime Shipping
Authority, et al.

BEFORE: Wright, Chief Judge; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards, and Ginsburg, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by appellants (Caribe Trailer Systems, Inc., et al) having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is

ORDERED, by the Court, *en banc*, that appellants' aforesaid suggestion for rehearing *en banc* is denied.

*Per Curiam*
FOR THE COURT
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
Chief Deputy Clerk

## APPENDIX D

**Memorandum of February 14, 1974, on Meetings of February 11 and 12, 1974, Prepared by Mr. Kesterman for Distribution to Puerto Rican Representatives Teodoro Moscoso and Others. Court of Appeals Joint Appendix pp. 874-879**

February 14, 1974

TO: Distribution
FROM: Kesterman
SUBJECT: RECENT MEETINGS WITH SEALAND, SEATRAIN & TTT, February 11th and 12th – ACTION ASSIGNMENTS

*STRATEGY SESSION*

At 8 A.M., Monday, February 11th, a strategy session was held to acquaint all parties with the latest happenings and information relevant to the meetings scheduled for the next 2 days. Present were: Ted Moscoso, Juan Albors, Francisco De Jesus Schuck, Judge Ramirez, Moe Moses, Mario Escudero, Fred Smith and Frank Kesterman.

*SEALAND MEETING* – 9:30 A.M., February 11, 1974.

The group met with Malcolm McLean and Allen Stevens of SEALAND. McLean stated that SEALAND would prepare a plan for Commonwealth takeover of the entire trade, using SEALAND Management as the general agent for the Commonwealth. McLean thought the plan could be accomplished for 20-25 million of which 8 million would be working capital and the remainder used for purchase of TTT assets. The plan to be prepared by SEALAND is to include:

a) rationalization of the Trade (consolidation of all carriers, services and facilities)
b) Financial Plan

c) Management Plan
d) Regulatory and Legal Plan
e) New Ship Construction Program

The plan is to be completed and circulated by March 6th for discussion at a meeting schedules for 10 A.M., March 11, 1974. This meeting will be held in McLean's office at 660 Madison Avenue, New York, New York.

Allen Stevens of McLean's corporate planning staff is to prepare the plan, meeting with Fred Smith as required to factor in other known considerations. Fred Smith, Frank Kesterman and Mario Escudero are then to review the plan for adequacy in all areas before the plan is sent to others in the negotiating group.

*SEALAND EVENING MEETING* – February 11th

At the evening meeting, February 11th, between McLean, Stevens, Smith and Kesterman, the framework of SEALAND's plan was revealed to include:

a) Removing all SEALAND ships from the East Coast trade and placing in service, three of SEALAND's larger C-4J containerships (610-35' containers).
b) Chartering three SEATRAIN ships (481-40' containers).
c) Using 2 of TTT's Ro-Ro ships and placing the third ship some place else in the SEALAND fleet.
d) Elimination of TTT's terminals in New York and Baltimore and consolidation of SEALAND's and TTT's terminals in San Juan.
e) Elimination of all SEATRAIN terminals.
f) Elimination of SEATRAIN and TTT managements.
g) A management contract with SEALAND service, whereby, SEALAND shares 50-50 in savings

below present total cost of service in the trade plus non-controllable future escalations associated with inflation and trade growth.

*SEATRAIN MEETING* – 3 P.M. February 11th

Representing SEATRAIN were Howard Pack, Chairman of the Board of Jim Connally, Vice President of Finance.

SEATRAIN was informed that the Commonwealth was now negotiating with SEALAND and because of that fact, a decision could not be made at this time with respect to the SEATRAIN proposals.

Pack stressed that SEATRAIN was under severe pressure from their bankers to liquidate or take other actions to cut their losses. Further, they presently are in the process of going to their banks for more working capital. Pack asked if we could start trading on the charters now in expectation that if we were in a position to make them an offer in 3-4 weeks, then at least they would know the terms of the offer. This was agreed to by the Commonwealth with the condition that a commitment to negotiate was not a commitment to make a firm offer. Kesterman has the responsibility for developing charter rates and equipment lease rates to form the baseline for negotiation. An independent marine surveyor is to inspect the vessels and equipment after negotiations appear heading in a positive direction. The Commonwealth's offer to SEATRAIN will be presented to SEATRAIN around February 25th. SEATRAIN will present their position with respect to the offer at a meeting to be held at the AFDA Club, Febuary 28th at 10 A.M.

*TTT MEETING* – February 12th

Attending for TTT were Peter Holzer and Paul Atkinson.

TTT agreed to the purchase price of $17 million subject to resolution of:

a) contingent liabilities and assets
b) a management contract for TTT
c) legal questions set forth in the Pepper, Hamilton & Scheetz letter dated February 6, 1974 attached.

Assignments were made to seek a resolution of the outstanding questions in the Pepper, Hamilton & Scheetz letter.

I. *Anti-Trust Proceedings* – Francisco de Jesus Schuck with the assistance of counsel will seek a no action ruling from the Justice Department of the intent to purchase the assets of TTT.

II. *Tax Position of GECC and Sun Oil Co.*

Matt Zinn and Mario Escudero, representing the Commonwealth and Allen Choate, representing Sun Shipbuilding to resolve the future status of TTT (P.R.) and FORTALEZA time charter with respect to maintaining U.S. source income for GECC, the ultimate owner of GECC.

III. *Proposed Management Contract*

Escudero to determine how to avoid another carrier (TMT) or shipper seeking injunction in a Federal District Court or via the FMC to block a monopoly placed under a management company which was also a carrier in the trade.

With respect to a management incentive formula, TTT did not like the one prepared by Kesterman. However, they did not offer any ideas on what

would be better. TTT was asked to submit an alternate management incentive plan.

IV. *Tax Consequences to TTT Shareholders*

It appears that the capital gains tax rate on the sale of stock (35%) will be considerably lower than the tax rate on income derived from the sale of assets (54-62%). Peter Holzer agreed to take the lead on this question.

V. *Necessity of FMC Approval.*

All attorneys agree that the FMC should not have jurisdiction over the sale of assets. However, the management Company could be considered a non-vessel owning common carrier, subject to the jurisdiction of the FMC. It was suggested that the management people might become employees of the Puerto Rico Maritime Shipping Authority to circumvent FMC jurisdiction. Escudero has the lead on this item.

VI. *Problems Under Long Term Financing Agreements*

Paul Atkinson and Fred Smith will work on the resolution of the problems of substituting of the Commonwealth for Sun Shipbuilding and Sun Oil on charter guarantees, working capital, maintenance and Flow of Funds Agreements.

*Note:* Maritime Administration has approved the Commonwealth as meeting the U.S. Citizen requirements and as such can own, charter and operate ships documented under the laws of the United States.

*BRAZIL TRADE & TTT MANAGEMENT*

Additional discussion was held on helping TTT develop a Brazil-Puerto Rico-U.S. Northbound trade as a means to find a way to constructively use TTT's management and Atkinson's shipbuilding capability to the net benefit of the Commonwealth.

It may be advisable to keep a second management organization somehow involved to keep SEALAND from having a monopoly in the long term which the Commonwealth would find overpowering and difficult to disengage from if the relationship proved to be unsatisfactory.

*NEW SHIPS*

We need to begin developing a fleet "optimization" study to determine new ship requirements and mix of Ro-Ro vs. containerships. Separate meetings will be held with ship designers, shipbuilders and operators to develop basic input data. Kesterman has lead on this project.

*DISTRIBUTION:*

| | | | |
|---|---|---|---|
| Moscoso | Francis | Albors | Francisco de Jesus |
| Ramirez | Moses | Smith | Zinn |
| Escudero | | | |

## APPENDIX E

**Replies to Interrogatories, Mr. Kesterman. Court of Appeals Joint Appendix, pp. 657-658.**

BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 74-44

AGREEMENT BETWEEN PUERTO RICO MARITIME SHIPPING AUTHORITY AND PUERTO RICO MARINE MANAGEMENT, INC./PUERTO RICO MARINE OPERATING COMPANY, INC.

RESPONSE OF FRANCIS R. KESTERMAN TO INTERROGATORIES PROPOUNDED BY CARIBE TRAILER SYSTEMS, INC. ON MAY 28, 1975

1. I have never been an employee of the Economic Development Administration or other agency of the

Development Administration or other agency of the Commonwealth of Puerto Rico. However, commencing April, 1973, I have been a consultant at various times for the Economic Development Administration and the Puerto Rico Maritime Shipping Authority.

2. My work assignments during 1973 and prior to January 23, 1974 were to counsel the Economic Development Administration and other government officials on maritime developments, including shipping, ship building and ports which affect the Commonwealth of Puerto Rico. In addition I prepared evaluations of proposals for the improvement of ocean transportation service between Puerto Rico and the exterior and represented the Economic Development Administration on inter-agency committees.

3. As I stated at page 20 of my deposition in this proceeding, I do not keep a calendar or diary, and it would be impossible to try to reconstruct every one of the literally hundreds of meetings I attended during this period.

4. Please see pages 19, 20, 69 and 70 of my deposition.

5. None.

6. Never.

7. My travel records reflect that I attended meetings in New York in 1973 up to January 23, 1974 as follows:

7/6, 7/11, 7/30, 8/6, 8/9, 8/14-15, 8/23, 8/30, 9/12, 9/19, 9/24, 10/1, 10/9-10, 10/15, 10/23, 11/12, 11/16-17, 11/19, 11/30 and 12/11.

I am a resident of the Washington area and maintain my office in Washington, D.C., and therefore it would be impossible for me to be more specific than to say that I was in Washington, D.C. during most of the period in question.

8. Please see answers to questions 3, 5, and 6 above.

I HEREBY CERTIFY that the above answers are true and correct to the best of my knowledge and belief.

/s/ Francis R. Kesterman
Francis R. Kesterman

Subscribed and duly sworn to before me a Notary Public this 11th day of June, 1975.

/s/ Ann E. Leasuskas
Ann E. Leasuskas
Notary Public

[SEAL]

My Commission Expires: 3/4/80

No. 80-843

DEC 24 1980

MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

CARIBE TRAILER SYSTEMS, INC. AND JOHN R. IMMER,
*Petitioners,*

v.

PUERTO RICO MARITIME SHIPPING AUTHORITY, ET AL.,
*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION


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December 23, 1980

## QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the District Court's finding that where the Legislature of the Commonwealth of Puerto Rico created a government-owned and controlled entity with a specific legislative mandate to displace competition with public provision of shipping services, the sale of shipping assets by private steamship companies to the government authority and the acquisition and operation of the assets by the government authority pursuant to such legislative mandate is immune from liability under the Sherman Antitrust Act, as a result of the "state action doctrine" enunciated in *Parker v. Brown*, 317 U.S. 341 (1943)?

2. Did the Court of Appeals err in affirming the District Court's finding that venue was not appropriate within the District of Columbia for the three respondents, R.J. Reynolds, McLean Industries, and Gulf Puerto Rico Lines?

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-843

CARIBE TRAILER SYSTEMS, INC. AND JOHN R. IMMER,
*Petitioners,*

v.

PUERTO RICO MARITIME SHIPPING AUTHORITY, ET AL.,
*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

### OPINIONS BELOW

The United States District Court for the District of Columbia entered summary judgment in favor of respondents on April 23, 1979. (Pet. App. 1a-31a). The District Court ruling was reported at 475 F.Supp. 711 (D.D.C. 1979). The United States Court of Appeals for the District of Columbia Circuit affirmed the District Court ruling in an unreported *per curiam* ruling entered on July 3, 1980. (Pet. App. 32a-33a.)[1]

[1] Pursuant to the provisions of Rule 28(1) of the Rules of this Court, the corporate respondents have included as Appendix A to this brief a list naming the parent companies, subsidiaries (other than wholly-owned subsidiaries) and affiliates of each such corporation.

## STATEMENT OF THE CASE

Because of Puerto Rico's small size, limited resources, and insular position, its economy is heavily dependent on external trade. Virtually all of this trade moves by ship — three-quarters of it between Puerto Rico and the East and Gulf Coast ports of the United States.

The dependence of the island's economy on affordable and reliable shipping services led the Governor of Puerto Rico, in 1973, to establish a special commission to study the feasibility of the Commonwealth's undertaking to acquire and operate shipping vessels in this trade. At that time three major carriers were operating between Puerto Rico and Gulf and East Coast ports: Seatrain, Inc., Sea-Land Service, Inc. and Transamerican Trailer Transport, Inc. The Governor's Commission studied Puerto Rico's existing and projected shipping needs as well as existing shipping service to the island. The Commission proposed legislation creating a public instrumentality to own and operate the shipping assets necessary to provide adequate service and pursued tentative negotiations with the three major carriers then engaged in the Gulf and East Coast/Puerto Rico trade.

On May 30, 1974, the Commission submitted a report containing the results of its study to the Puerto Rico Senate. The report gave detailed consideration not only to the specific shipping capacity the new instrumentality would need to acquire, but also to the legal issues that arose under the federal antitrust laws as a result of creating state monopoly service. The Commission reported that, under the state action doctrine, an express governmental mandate creating and governing "a child of the state" would exclude the proposed shipping authority from antitrust liability.

On June 10, 1974, the Puerto Rico Legislature enacted Public Law No. 62, the Puerto Rico Maritime Shipping Authority Act, 23 P.R. Laws Ann. §3051 *et seq.* (1978) (the "PRMSA Act"). The PRMSA Act created the Puerto Rico Maritime Shipping Authority ("PRMSA"), a tax-exempt, nonstock public corporation, and directed it to acquire and operate private shipping lines as a public service. Under the provisions of the PRMSA Act, PRMSA is governed by a seven-member board appointed by the Governor with the advice and consent of the Puerto Rico Senate. *Id.* §3054. Its bonds are secured by the Commonwealth and its profits are paid directly into the Commonwealth's Treasury. *Id.* §§3068, 3072. PRMSA is required to file annual reports concerning its operations with the Governor and Puerto Rico Legislature. *Id.* §3073.

In this enabling legislation, the Legislature underscored the critical dependence that Puerto Rico's economy had on shipping facilities and made a determination, expressed clearly in the PRMSA Act, that the public interest of Puerto Rico in being able to rely on adequate and stable maritime transportation outweighed any harm that might result from anticompetitive acts necessary to provide this service. It therefore concluded that PRMSA should not be subject to antitrust liability.

> The Legislature of Puerto Rico intends that this instrumentality acquires and operates shipping lines and terminal facilities as a public service, and that in doing so, it shall not be subject to the antitrust laws nor any other limitation that could hinder the effective discharge of the endeavor that this act has imposed on the public instrumentality hereby established.

Statement of Motives, Public Law No. 62, June 10, 1974.

Prior to effecting the transfers of assets from the private carriers to PRMSA, the Commonwealth of Puerto Rico sought a business review letter from the Antitrust Division of the Department of Justice. In its submission to the Department of Justice, the Commonwealth fully outlined the nature, purpose and effect of PRMSA's proposed plan of acquisition and operation. Although the acquisitions gave PRMSA control over approximately 90 percent of the then existing maritime transportation to and from Puerto Rico, the Antitrust Division indicated by letter dated July 22, 1974, that it would take no action to challenge the acquisitions. Accordingly, PRMSA proceeded to acquire vessels and related equipment from the three major shipping lines then serving Puerto Rico.

In the course of effecting the sale, respondents Sea-Land Service, Inc. ("Sea-Land"), Gulf Puerto Rico Lines, Inc. ("GPRL"), McLean Industries, Inc. ("McLean") and R.J. Reynolds Industries ("Reynolds") met on occasion with counsel and with representatives of PRMSA in the District of Columbia for purposes of negotiating contract terms. At that time GPRL was a wholly-owned subsidiary of Sea-Land. Sea-Land in turn was owned by McLean, which was itself a wholly-owned subsidiary of Reynolds.

Petitioner Caribe Trailer Systems, Inc. ("Caribe") was created by petitioner John R. Immer for the asserted purpose of engaging in ocean transportation between the East Coast and Gulf ports of the United States and Puerto Rico. Caribe, however, never became operational. Caribe does not own, lease, charter or operate any vessels, terminals or other capital assets, and has no employees.

Shortly after the creation of PRMSA in 1974, the Federal Maritime Commission ("FMC") instituted a proceeding to determine whether certain agreements relating to the creation and operation of PRMSA constituted cooperative working arrangements within the meaning of Section 15 of the Shipping Act of 1916, 46 U.S.C. §814 (1970), which requires FMC approval of such arrangements prior to implementation. Petitioners participated in that proceeding which was dismissed by the FMC on August 5, 1977.

On March 13, 1978, petitioners brought this suit alleging conspiracy, monopoly, and restraint of trade in violation of Sections 1, 2 and 3 of the Sherman Act, 15 U.S.C. §§1-3 (1976). The twelve defendants in this action were PRMSA, Puerto Rico Ports Authority ("PRPA"), Puerto Rico Marine Management, Inc. ("PRMMI"), Sea-Land, Transamerican Trailer Transport, Inc. ("TTT"), American Union Transport ("AUT"), Sun Shipbuilding & Dry Dock Co. ("Sun Ship"), GPRL, McLean, Reynolds, TKM Transportation ("TKM"), and Trans Ocean Transportation Executive Management, Inc. ("TOTEM"), each one of which was directly or indirectly involved in the acquisition or operation of the shipping assets.

Respondents filed motions for summary judgment asserting that (i) the transactions that formed the basis for petitioners' complaint were immune from the antitrust laws under the state action doctrine enunciated in *Parker v. Brown*, 317 U.S. 341 (1943), (ii) the court lacked *in personam* jurisdiction, and (iii) venue was improper in the District of Columbia. At no time did petitioners initiate or attempt to initiate any discovery. On April 23, 1979, the District Court issued an order and opinion dismissing the complaint against PRMSA,

PRPA, PRMMI, TTT, TKM, Sea-Land, AUT, TOTEM and Sun Ship by reason of the state action doctrine, and dismissing the complaint against Reynolds, McLean and GPRL for lack of venue.

Petitioners appealed the ruling to the Court of Appeals. In their briefs on appeal, petitioners did not confine themselves to the antitrust and venue questions raised by the complaint below but also offered additional arguments that were not raised or had been conceded below.

On February 13, 1980, the Court of Appeals issued an order making the United States a party to the case *amicus curiae* and requesting that the views of the United States on the matters in issue be submitted. In accordance with that order, Assistant Attorney General Sanford M. Litvak of the Department of Justice, Antitrust Division, submitted an *amicus curiae* brief in the proceeding on behalf of the United States. In its brief, the Department of Justice argued that the acquisition and operation of the shipping assets by the Puerto Rico agencies came well within the ambit of the state action doctrine and that the related activities of the private parties necessarily came under the umbrella of the agencies' immunity from antitrust liability.

In their brief submitted in response to the *amicus curiae* brief of the United States, petitioners argued for the first time that the PRMSA Act violated the Commerce Clause of the United States Consitution. In the same brief, petitioners made a series of unsupported allegations concerning the composition of the appellate panel, the relation of former Secretary of Commerce Juanita Kreps to respondent Reynolds and the failure of the Attorney General to discharge his duty to defend the

public interest. Respondents filed a motion to strike portions of petitioners' brief as being scandalous and immaterial.

The Court of Appeals denied respondents' motion but the next day issued a *per curiam* opinion affirming the lower court's ruling. The Court of Appeals declined to rule on petitioners' extraneous arguments, noting that "We are satisfied that the district court correctly identified the issues raised by the plaintiff as involving only violations of the Sherman Act." (Pet. App. 32a).

## REASONS WHY THE WRIT SHOULD BE DENIED

This case possesses none of the characteristics that generally warrant review of a lower appellate court ruling by this Court. This case involves a relatively narrow area of the law that has been addressed in detail by this Court. The decision of the Court of Appeals conforms with prior rulings of this Court and does not conflict with the decision of any other circuit. Though petitioners aver that sweeping principles confront the Court in this case, few of the principles identified by petitioners were involved in the decisions below.

The courts below did not hold PRMSA immune from "federal laws". They held simply that, under the facts in this case, it was immune from federal antitrust laws by virtue of the state action doctrine.

The courts below did not declare Puerto Rico a "state" for all purposes. They ruled only that it was the equivalent of a state for purposes of applying the state action doctrine.

The courts below did not rule that Puerto Rico retained sovereign immunity beyond its territorial borders. Indeed, the question of sovereign immunity was never

reached because the courts found there was no liability in the first instance.

Furthermore, the courts below did not pass upon the validity of the PRMSA Act under the Second Organic Act of Puerto Rico or the Commerce Clause. Neither of those issues was raised by petitioners in their complaint.

The courts below ruled on two sharply-focused issues: the state action doctrine and venue. In deciding those issues, the lower court relied on well-established precedent. There is, accordingly, no cause for this Court to review the decision of the Court of Appeals.

**1. The Court Of Appeals Decision Affirming The District Court's Ruling That The Activities Of Respondents Challenged In The Complaint Are Immune From Antitrust Liability Under The State Action Doctrine Is Consistent With Decisions Of Other Circuits And This Court.**

The fundamental question before this Court is whether the Court of Appeals correctly affirmed the District Court's ruling that the respondents' activities in connection with the formation and operation of PRMSA were immune from antitrust liability under the state action doctrine.

The District Court carefully assessed the respondents' claim of immunity from the antitrust laws against the established tests for determining the applicability of the state action doctrine and found that the challenged activities were immune. The court's holding was limited to the specific allegations in petitioners' complaint. Contrary to petitioners' contention, the opinion did not address and has no bearing on the issue of Puer-

to Rico's liability under any other federal law or any other set of facts.

(1) The District Court, in considering the respondents' claim of immunity from the antitrust laws under the state action doctrine enunciated in *Parker* v. *Brown*, considered in some detail recent judicial treatment of the doctrine. After reviewing the holdings and underlying facts of *Parker, City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), and other cases, the District Court restated the criteria by which it judged respondents' actions: "In summary, the most recent judicial interpretations of the state action doctrine require that the anticompetitive conduct engaged in by a state instrumentality be undertaken pursuant to a governmental policy to displace competition with regulation or monopoly public service." (Pet. App. 26a). The standard employed by the District Court for assessing the validity of a claimed immunity under the state action doctrine is virtually identical to the standard set forth in *City of Lafayette* where this Court found that actions of state instrumentalities are not immune unless they are undertaken "pursuant to state policy to displace competition with regulation or monopoly public service." 435 U.S. at 413 (plurality opinion).

The test applied by the District Court is also consistent with this Court's subsequent ruling in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, _____ U.S. _____, 100 S.Ct. 937 (1980). In *Midcal* the Court, relying on its opinion in *City of Lafayette*, expressed the test for determining antitrust immunity as follows:

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively super-

> vised" by the state itself. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (opinion of BRENNAN, J.).

*Id.* at 943.

The creation of PRMSA by the Puerto Rico Legislature clearly meets this test. Moreover, the activities of the private respondents in selling the shipping assets and operating them on behalf of PRMSA also meet this test, for those activities were undertaken solely to implement the Puerto Rico Legislature's mandate embodied in the PRMSA Act. As the District Court said:

> In the present action the nongovernmental defendants maintain that their conduct is immune from antitrust liability because of the state action immunity applicable to PRMSA. The Court agrees with this interpretation, for it would be anomalous to hold that PRMSA, the state-sanctioned mechanism for acquiring control of the island's ocean transportation, was immune as the buyer of the assets of certain carriers and simultaneously to withhold such immunity from the selling carriers. Similarly defendants PRMMI, TKM, and TOTEM, whose involvement in this lawsuit arises from their operation and management of cargo vessels on behalf of PRMSA, cannot be held liable under the antitrust laws if PRMSA's conduct in operating the ships was immunized.

(Pet. App. 27a, 28a.)

The logic of this principle is underscored by the fact that refusal to extend state action immunity to private parties involved in related activities would allow litigants to thwart state policies by pursuing antitrust claims against private parties so involved.

In *Midcal* this Court once more reiterated the principle that where a state displaces "unfettered business

freedom" with its own power, such activity is immune from the Sherman Act. 100 S.Ct. 937, 943. *See also New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978). The creation and operation of PRMSA are immune under this principle.

The Court of Appeals ruling was made with the benefit of this Court's holding in *Midcal*. There is no conflict between the lower court's ruling, as affirmed by the Court of Appeals, and the prior rulings of this Court. Nor is there any conflict with the rulings of any other circuit.

(2) The fallacy inherent in petitioners' argument that the state action doctrine does not extend to governmental action that has effects beyond the geographic boundaries of the state was ably exposed by the District Court in its opinion and by the Department of Justice in its *amicus curiae* brief. The District Court noted in dismissing petitioners' "extraterritoriality" argument:

> A necessary element of any violation of the federal antitrust laws is an effect on interstate commerce. . . . The exemption created in *Parker* v. *Brown* for state action must be coextensive with the scope of the Sherman Act and thus is applicable to the interstate effects of a particular form of state action. *Parker* v. *Brown* itself supports this analysis, for that case involved action by the State of California to raise and stabilize the price of raisins, ninety-five percent of which were sold outside the state. 317 U.S. at 345. Plaintiffs' "extraterritoriality" argument is in direct conflict with the fundamental message of *Parker* that the entire Sherman Act, including its extraterritorial coverage, was never intended to restrain state action undertaken pursuant to a proper legislative mandate to displace competition.

(Pet. App. 25a, 26a.)

Petitioners' portrayal of the *Parker* decision as holding that the state action doctrine applies only "where there was no element of interstate commerce" (Pet. at 11) is simply wrong. If there were no element of interstate commerce in this case, the Sherman Act would not apply and the question of immunity under the state action doctrine would not arise.

(3) The lower court found that "Puerto Rico is a state for purposes of applying the *Parker* doctrine." (Pet. App. 18a). Aside from the fact that petitioners conceded this point in the District Court and the issue was thus not properly raised on appeal, petitioners are unable to cite any relevant case with which this ruling conflicts. On the contrary, it has been specifically held that Puerto Rico should be considered as a state for purposes of applying the state action doctrine to the actions of the government of Puerto Rico. *International Telephone & Telegraph Corp.* v. *General Telephone & Electronics Corp.*, 351 F.Supp. 1153, 1229 (D. Hawaii 1972), *modified on other grounds*, 518 F.2d 913 (9th Cir. 1975).

Petitioners' reliance on the Court's recent decision in *Harris* v. *Rosario*, _____ U.S. _____, 48 U.S.L.W. 3765 (May 27, 1980) (*per curiam*), as a conflicting holding is misplaced. *Rosario* dealt with the authority of Congress to treat Puerto Rico differently than the states for purposes of defining Medicare benefits. The Court's finding that Congress has such authority does not raise any question regarding the validity of the holding that, for purposes of applying the state action doctrine, Puerto Rico is properly treated as the equivalent of a state.

(4) Petitioners have asked this Court to consider whether Puerto Rico loses its sovereign immunity when

it engages in commercial activities or operates outside its borders. Petitioners' attempt to commingle the doctrine of sovereign immunity with the notion of immunity from the antitrust laws, however, misconceives the thrust of the state action doctrine. Activities that come within the state action doctrine are immunized from any liability under the antitrust laws on the theory that Congress in enacting the antitrust laws did not intend to prohibit such activities. As the First Circuit said in rejecting a similar contention that sovereign immunity principles apply to the state action doctrine: "[W]e do not reach any question of immunity, since there is no attempt on the part of Congress to impose liability in the first instance." *E.W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52, 56 (1st Cir. 1962), *cert. denied*, 385 U.S. 947 (1966).

**2. The Validity Of The PRMSA Act Under The Second Organic Act Of Puerto Rico And Its Validity Under The Commerce Clause Of The Constitution Were Not Questioned In The Complaint And Were Not Ruled On By The Court Of Appeals And, Therefore, Are Not Proper Grounds For Granting The Petition For Writ Of Certiorari.**

Petitioners' arguments that the PRMSA Act is invalid because (i) it violates the provisions of the Second Organic Act of Puerto Rico, 48 U.S.C. §821 (1976), and (ii) it contravenes the provisions of the Commerce Clause of the Constitution should not be considered as grounds for granting the petition for writ of certiorari. These arguments were not advanced before the District Court.

Sections 1, 2 and 3 of the Sherman Act formed the sole basis for petitioners' complaint in this action.

Neither the District Court nor the Court of Appeals ruled on petitioners' belated arguments regarding the validity of the PRMSA Act under the Second Organic Act and the Commerce Clause. The Court of Appeals in its *per curiam* decision made it clear that ". . . the district court correctly identified the issues raised by the plaintiff as involving only violations of the Sherman Act. On these issues we are in agreement with the district court's disposition." (Pet. App. 32a.) Accordingly, these arguments afford no basis for granting the petition for writ of certiorari in this case.

### 3. The Lower Courts Correctly Determined That Venue Was Not Appropriate In The District Of Columbia For Respondents R.J. Reynolds Industries, Inc., McLean Industries, Inc., And Gulf Puerto Rico Lines, Inc.

This Court should not exercise its discretion to review the Court of Appeals' *per curiam* affirmance of the District Court's finding on venue as to Reynolds, McLean and GPRL. So long as the District Court's decision on the applicability of the state action doctrine remains, the venue ruling is inconsequential. Moreover, as a practical matter, the District Court's decision that venue is lacking against Reynolds, McLean and GPRL can have no adverse monetary effect on petitioners. Venue is not disputed as to Sea-Land Service, the Reynolds subsidiary that was actually engaged in the Puerto Rico trade prior to formation of PRMSA. Sea-Land is a substantial company, fully capable of answering any judgment petitioners could obtain if they were successful on the merits.

In support of their venue claim, petitioners rely here for the first time on the District of Columbia's "long

arm'' provision, D.C. Code §13-423 (Supp. 1980). The ''long arm'' provision does not provide for the laying of venue. Moreover, the provision was not part of petitioners' argument before the Court of Appeals. It, therefore, is not now properly a basis for granting a petition for writ of certiorari. *O'Bannon* v. *Town Court Nursing Center*, _____ U.S. _____, 48 U.S.L.W. 4842, 4844 n. 14 (June 24, 1980).

Petitioners' additional reliance on the federal venue provisions, 28 U.S.C. §1391(b) (1976), also fails to raise any issue that is worthy of this Court's consideration. The relevant portion of Section 1391(b) provides for venue in the judicial district in which the claim arose. The District Court found that there were no overt acts in the District of Columbia which constituted a ''significant and substantial'' element of the purported offense. It accordingly determined, consistent with the holding in *Philadelphia Housing Authority* v. *American Radiator & Standard Corp.*, 291 F.Supp. 252 (E.D. Pa. 1968), that petitioners had not demonstrated that the claim arose in the District of Columbia.

The District Court did find that there were meetings among the respondents within the District, but it concluded that these meetings could not be construed as actions related to an antitrust violation. Thus, even if petitioners' ''coconspiratorial'' view of the various governmental and private parties is given credence, it makes no difference in the application of Section 1391(b). No act in furtherance of the supposed conspiracy was found to have taken place within the District. *See Mandelkorn* v. *Patrick*, 359 F.Supp. 692 (D.D.C. 1973).

In sum, the present venue question raises no issues of first impression. Nor is there a conflict among the cir-

cuits. The District Court's ruling represents nothing more than the application of well-settled law to undisputed facts.

## CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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December 23, 1980

# APPENDIX

## Appendix A

R. J. Reynolds Industries, Inc. wholly owns McLean Industries, Inc., Sea-Land Industries, Inc., and Gulf Puerto Rico Lines, Inc. Subsidiaries and affiliates of these corporations, other than wholly-owned subsidiaries and affiliates, are:

R. J. Reynolds Tobacco Co. GmbH
R. J. Reynolds Tobacco Co. Limited
Iranian Oil Participants Ltd.
Iranian Oil Services Holding, Ltd.
Iranian Oil Services, Ltd.
Iricon Agency, Ltd.
Pars Investment Corporation
Minas y Petroleos del Ecuador, S.A.
Petrolera Yusani, S.A.
Central African Petroleum Refineries (Prf) Ltd.
Solar Gas, Inc.
Long Beach Oil Development Co.
Signal Oil of Louisiana, Inc.
Alimentos Mexicanos Selectos, S.A. de C.V.
Canadian Canners Limited — Conserveries Canadiennes Limitee
Calpak Espanola, S.A.
Compania Venezolana de Conservas C.A.
Helenic Food Industries, S.A.
Kenya Canners Ltd.
Japan Calpak Co., Ltd.
Tabacos Capote, S.A.
Litogra Fia A. Romero S.A.
Fabrica de Cigarrillos El Progreso S.A.
Fabrica de Cigarros Baloyan, S.A.
P. T. R. J. Reynolds Indonesia
Filtrona Canada, Ltd.
R. J. Reynolds Tobacco GmbH
Zigaretten-Umsatz-Verguetungsstelle (ZUV) GmbH
R. J. Reynolds Tobacco Limited (N.Z.)
Supreme Tobacco Company N.V.
Tabacos Capote, S.A.

Entremar, S.A.
Hanjin Container Lines, Ltd.
Paringer Investments Ltd.
Crescent Transportation Company Ltd.
Marine Ro-Ro Feedships Corp.
World Feederships, Inc.
Aladdin Container Enterprises

Sun Ship, Inc., is a wholly-owned subsidiary of Sun Company, Inc. The subsidiaries (including wholly-owned subsidiaries) and affiliates of Sun Ship., Inc., are:

Suncor Inc.
- Albersun Pipeline Ltd.
- Alberta Gas Trunk Line Company Ltd.
- Apet Products Pipe Line Limited
- Athabasca Realty Company Limited
- Baron Petroleums Inc.
- Carnduff Gas Limited
- Gow Fuels Inc.
- Maywelle Properties Ltd.
- Nottingham Gas Limited
- Ouimet-Gobeille Inc.
- Redwater Water Disposal Company Limited
- SMS Petroleums Ltd.
- Sultran Ltd.
- Sun-Canadian Pipe Line Company Limited
- Sun Explorations of Quebec Ltd.
- Sun Oil Company of Canada Limited
- Suncor Supply Limited
- Sunoco Home Comfort Inc.
  - Muskoka Oil Company Limited
- Sunoco Inc.
  - Chemsun Inc.
  - Solartech Limited
  - Sunchem Inc.
  - Sunchem Shipping Inc.
- Sunray DX Canada Oil Company

Sun Oil Company (Delaware)
- Sun Gas Company, A Division
  - Planters Fertilizer Company, Inc.
  - Sun Gas Gathering Company, Inc.
  - Sun Gas Liquids, Inc.
  - Sun Gas Terminals and Storage, Inc.
  - Sun Gas Terminals and Storage (PA.), Inc.
  - Sun Nitrogen Products, Inc.
- Sun Production Company, A Division
  - Canyon Reef Carriers, Inc.
  - East Texas Salt Water Disposal Company
  - Jaresa Gas Gathering Company
  - Marble Falls Gas Co.
  - Radep Pipeline Company
  - Sunoco Operations, Inc.
  - Van Salt Water Disposal Company
- Sun Texas Company, A Division

Sunmark Exploration Company, A Division
- Angola Sun Oil Company
- Arabian Sun Oil Company
- Argentine Sun Oil Company
- Australian Sun Oil Company, Ltd.
- Bolivian Sun Oil Company
- Burma Sun Oil Company
- Deutsche Sun Oil Company
- Dubai Sun Oil Company
- Ecuador Sun Oil Company
- French Sun Oil Company
- Hispanic Sun Oil Company
- Indonesia Sun Oil Company
- Iranian Sun Oil Company
  - Lavan Petroleum Company
- Irish Sun Oil Company
- Kenya Sun Oil Company
- Liberian International American
- Libyan Sun Oil Company
- Mali Sun Oil Company
- Maroc Sun Oil Company

Mediterranean Sun Oil Company, S.p.A.
Niger Sun Oil Company
Noordzee Sun Oil Company
Scandinavian Sun Oil Company A/S
North Sea Sun Oil Company, Ltd.
Oman Sun Oil Company
Pakistan Sun Oil Company
Peruvian Sun Oil Company
Phillipine Sun Oil Company
Portugal Sun Oil Company
Solgas, Inc.
Sun Eastern Exploration Company
Sun Oil Algerie Inc.
Sun Oil Company (U.K.) Ltd.
Viking Oil Limited
Sun Oil International, Inc.
Liberian International American
Sun Orient Exploration Company
Sun Overseas Services, Inc.
Sun Support Services, Inc.
Sun Support Venezuela, Inc.
Sunmark Indonesia, Inc.
Sunmark Overseas Petroleum, Inc.
Sunmark Worldwide Services, Inc.
Sunray Australian Oil Company, Inc.
Sunray Borneo Oil Company, Inc.
Sunray Columbia Oil Company
Sunray Iranian Oil Company, Inc.
Sunray Nigeria, Inc.
Sunray Nigeria Oil Company Unlimited
Sunray Venezuela Oil Company, Inc.
Venezoil C.A.
Thailand Sun Oil Company
Venezuelan Sun Oil Company
Vietnam Sun Oil Company
Marine Investment Company of Delaware
Alaska Bulk Carriers, Inc.
Delaware Sun Shipping, Inc.

Delaware Valley Marine Agency
and Repair, Inc.
Eastern Sun Shipping, Inc.
Florida Barge Company
Glacier Bay Transportation Company
Millcreek Leasing Corporation
New Jersey Sun Shipping, Inc.
New York Sun Shipping, Co., Inc.
Northern Sun Shipping, Co., Inc.
Atlantic Sun Shipping, Company, Inc.
Balboa Sun Shipping Company, Inc.
Mediterrean Sun Shipping Company, Inc.
Sarnia Shipping Company, Inc.
Welland Shipping Company, Inc.
Pennsylvania Sun Shipping, Inc.
Philadelphia Sun Shipping Co., Inc.
Sun Barge Company
Sun Transport, Inc.
Texas Sun Shipping, Inc.
Virginia Sun Shipping Co., Inc.
Western Sun Shipping, Inc.
Sun Carriers, Inc.
Carolina Consolidators, Inc.
Carrier Systems, Inc.
CSI Five, Inc.
CSI Six, Inc.
CSI Seven, Inc.
CSI Eight, Inc.
CSI Nine, Inc.
CSI Ten, Inc.
Jones Truck Lines, Inc.
CSI Two, Inc.
Milne Truck Lines, Inc.
S.J.T., Inc.
SJT Real Estate Holding Co., Inc.
SJT-Cambridge Realty Corp.
SJT-Masbeth Realty Corp.
St. Johnsbury Trucking Company, Inc.

Zelco, Inc.
Standard Trucking Company
Sun Pipe Line Company
Sun Pipe Line Company of Delaware
Explorer Pipeline Company
Inland Corporation
Mid-Continent Pipe Line Company
Mid-Valley Pipeline Company
Sun Oil Line Company of Michigan
Sun Pipe Line Services Co.
Texoma Pipe Line Company
West Texas Gulf Pipe Line Company
Sun Ship, Inc.
El Taino Operations, Inc.
GTS Venture Corporation
Sunexport
660 Leasing Company
663 Leasing Company
Sound Shipping, Inc.
TTT, Inc.
Sun Terminals, Inc.
Gulf Coast Marine Agents, Inc.
Gulf Coast Marine Fueling, Inc.
Lou Petroleum Company
Lou Towing Company
STI Investments, Inc.
Sunoco Terminals, Inc. (DE)
Sunoco Terminals of Baltimore, Inc.
Sun International, Inc.
Middle East Sun Oil Company
Petrosun Limited
Sun International Limited
Sun Hydorponics Limited (Bermuda Gardens, Ltd.)
Sun Trading (Caribe) Limited
Sun Oil Trading Company
British Sun Oil Company, Limited
Sunoco International Limited

Hemisphere Oil Company, Inc. (DEL.)
Hemisphere Oil Company, Inc. (PR)
International Fuel Corporation
Japan Sun Oil Company
Liberia Refining Company
Sun Oil Company (Belgium) N.V.
Sun Oil Company (Nederland) B.V.
B.V. De Lange's Oliehandel, Hoogeveen
Deluxol Oil Company B.V. (Rotterdam)
Sun Oil GMBH
Sunoco A.G.
Sunoco Limited
Sunoco Overseas, Inc.
Petromech SDN. BHD.
Sunoco Overseas Limited
Lugrasa, S.A.
Sunoco Petrochemicals Limited
Sunray DX Liberia Oil Company
Sunoco Disc, Inc.
Sunoco, Inc.
Sun Oil Company of Pennsylvania
Sun Petroleum Products Company, A Division
Carboline Company
Carboline Eastern Europe Corporation
Carboline Dubai Corporation
Carboline Export Corporation
Carboline Far East Corporation
Carboline International Corporation
Carboline World-Wide Corporation
Corpus Christi Refining, Inc.
Prestige Lubricants, Inc.
Puerto Rico Sun Oil Company
Puerto Rico Sun Realty Company, Inc.
Yabucoa Sun Oil Company, Inc.
Sun Industrial Development Company
Sun Oil Power Services Company
Sun Oil Export Company
Sunoco Science and Technologial
Services, Inc.

Sunolin Chemical Company
Suntech, Inc.
Toledo Refining, Inc.
Tulsa Refining, Inc.
Parachem, Inc.
Riverway, Inc.
Sunmark Industries, A Division
Fast Fare, Inc.
Fast Fare Markets of N.C., Inc.
Fast Fare Markets of S.C., Inc.
Kwik-Pik Realty, Inc.
Tiny Tote, Inc.
J-C, Inc.
Mr. Zip, Inc.
Zippy Mart, Inc.
Zippy Mart of Alabama, Inc.
Zippy Mart of Georgia, Inc.
Zippy Mart of South Carolina, Inc.
Zippy Mart Properties, Inc.
H.H. Palmer, Inc.
Herr Gas & Oil Co.
Hotchkiss Oil Company, Incorporated
Kelly Company
Kenco Petroleum Marketers Incorporated
Lansing-Lewis Company
Lansing Oil Company
Mascot Petroleum Company, Inc.
Mid-State Oil Company
Minnisink Oil Company, Inc.
Modern Oil Company
Mohawk Valley Oil, Inc.
Montour Auto Service Company
Smith Oil Corporation
Stop-N-Go Foods, Inc.
Buckeye Marketers, Inc.
Big Top Market, Inc.
Diversified Retailers, Inc.
Hoosier Stop-N-Go, Inc.

J.M.J. Enterprises, Inc.
Sioux Foods, Inc.
Casual Food Stores, Inc.
Stop-N-Go Foods of Dayton, Inc.
Stop-N-Go, Inc.
Stop-N-Go of Ohio, Inc.
Stop-N-Go of Southern Minnesota, Inc.
Super Go Marketers, Inc.
Tri-State Stop-N-Go, Inc.
Suncrest Industries, Inc.
Thill Oil Company, Inc.
Travelers Oil Company, Inc.
Your Party Stores, Inc.
Dunigan Tool and Supply Company, Inc.
Helios Capital Corporation
Beneco Leasing One, Inc.
Beneco Leasing Two, Inc.
Beneco Leasing Three, Inc.
Beneco Leasing Four, Inc.
Heleasco One, Inc.
Heleasco Two, Inc.
Heleasco Three, Inc.
Heleasco Four, Inc.
Heleasco Five, Inc.
Heleasco Six, Inc.
Heleasco Seven, Inc.
Heleasco Eight, Inc.
Heleasco Nine, Inc.
Heleasco Ten, Inc.
Heleasco Eleven, Inc.
Heleasco Twelve, Inc.
Heleasco Thirteen, Inc.
Heleasco Fourteen, Inc.
Heleasco Fifteen, Inc.
Heleasco Sixteen, Inc.
Heleasco Seventeen, Inc.
Heleasco Eighteen, Inc.
Heleasco Nineteen, Inc.

Heleasco Twenty, Inc.
Heleasco Twenty-One, Inc.
Heleasco Twenty-Two, Inc.
Heleasco Twenty-Three, Inc.
Heleasco Twenty-Four, Inc.
Heleasco Twenty-Five, Inc.
Heleasco Twenty-Six, Inc.
Heleasco Twenty-Seven, Inc.
Heleasco Twenty-Eight, Inc.
Heleasco Twenty-Nine, Inc.
Heleasco Thirty-One, Inc.
Heleasco Thirty-Two, Inc.
Heleasco Thirty-Three, Inc.
Heleasco Thirty-Four, Inc.
Kee Leasing Company
650 Leasing Company
652 Leasing Company
653 Leasing Company
666 Leasing Company
667 Leasing Company
670 Leasing Company
673 Leasing Company
675 Leasing Company
Sun Leasing Company

Radnor Corporation
Langford Farms Country Club, Inc.
Morgan's Run Corporation
Olney Oaks Land Development Corporation
Radnor/Aire Corporation
Radnor/Anderson Corporation
Radnor/Arlington Corporation
Radnor/Aston Corporation
Radnor/Birmingham Corporation
Radnor/Bloomfield Hills Corporation
Radnor/Brownsboro Corporation
Radnor/Brown Street Corporation
Radnor/Castleton Corporation
Radnor/Centre Corporation

Radnor/Cherry Tree Corporation
Radnor Development Corporation
Radnor/Dixie Corporation
Radnor/Fairland Corporation
Radnor/Grand Rapids Corporation
Radnor/Greenhouse Corporation
Radnor/Hampton Corporation
Radnor Homes, Inc. Corporation
Radnor/Hunters Pointe Corporation
Radnor/Hurstbourne Corporation
Radnor/I-95 Industrial Park Corporation
Radnor/Investment Corporation
Radnor/Island Corporation
Radnor/Jacksonville Corporation
Radnor/Juno Corporation
Radnor/Jupiter Corporation
Radnor/Jupiter Inlet Corporation
Radnor/Laguna Hills Corporation
Radnor/Matsonford Corporation
Radnor/Michigan Corporation
Radnor/Mishawaka Corporation
Radnor/Nashville Corporation
Radnor/National Square Corporation
Radnor/Newton Corporation
Radnor/Northwood Corporation
Radnor/Oakland Corporation
Radnor/Oceana Corporation
Radnor/Oceana South Corporation
Radnor of Hutchinson Island Corporation
Radnor/Orange Corporation
Radnor/Pennell Corporation
Radnor/Perimeter Park Corporation
Radnor/Portsmouth Corporation
Radnor/Ridge Corporation
Radnor/Route 100 Corporation
Radnor/Sandalwood Corporation
Radnor/Service Corporation
Radnor/Siesta Key Corporation

Radnor/St. Lucie Corporation
Radnor/Sugarland Corporation
Radnor/Tyson's Corner Corporation
Radnor/Uwchlan Corporation
Radnor/Valley Wood Corporation
Radnor/Viewpointe Corporation
Radnor/West Palm Beach Corporation
Radnor/West Palm Beach No. 2 Corporation
Striker, Inc.
Environmental Services of New Jersey, Inc.
Environmental Waste, Inc.
Sperry-Sun, Inc.
Cochran-Dean Co.
Reamco, Inc.
Russell Attitude Systems, Ltd.
Russell Attitude Systems Marketing Co.
Sperry-Sun International, Inc.
Sperry-Sun Do Brazil — Servicos Technicos Ltda.
Sperry-Sun of Canada, Ltd.
Sperry-Sun U.K., Ltd.
Sun Distributors, Inc.
American Electric Company
Philips & Company, Columbia, Missouri
Atlas Screw & Specialty Co., Inc.
Dorman Products, Inc.
Federal Pipe and Steel Corporation
General Industrial Supply Corp.
Harding Glass Industries, Inc.
Roto-Swing, Inc.
J.N. Fauver Co., Inc.
J.N. Fauver (Canada) Limited
Kar Products, Inc.
Raub Supply
Special-T-Acquisition Corporation
(Special-T-Metals Company, Inc.)
Walter Norris Corporation
Winter Acquisition Corp.

Sun Information Services Company
Applied Financial Systems, Inc.
Catallactics Corporation
NMF, Inc.
Sun Information Services of Kentucky, Inc.
Sun Services Corporation
The Weiland Computer Group, Incorporated
Financial Independents, Inc.
Independent Bank Computer Corporation
Totem Ocean Trailer Express, Inc.
Elk River Resources, Inc.
Jewell Resources Corporation
Anchor Red Ash Coal Corporation
Cumberland Collieries, Inc.
Dominion Coal Corporation
Jewell Coal and Coke Company, Inc.
Jewell Smokeless Coal Corporation
Jewell Supply Company
Oakwood Red Ash Coal Corporation
Vansant Coal Corporation
Shamrock Resources Corporation
Clover Coal Company, Inc.
Enexco, Inc.
Fourleaf Coal Company, Inc.
Freedom Coal Company, Inc.
Greenleaf Equipment Company
Greenwood Land & Mining Company
Plymouth Coal Company, Inc.
Shamrock Coal Company Incorporated
West Virginia Resources Corporation
Oneida Coal Company, Inc.
Scott Equipment Company
Wolf Creek Coal Company
Sunoco Energy Development Co.
Bighorn Ranch, Inc.
Sunedco Coal Co.
Sweetwater Coal Development Co.
Cordero Mining Co.

White River Shale Oil Corporation
Alliance Enterprise Corporation
L H I W, Inc.
Becton, Dickinson and Company
Sun Exchange, Inc.
Sun Ocean Ventures, Inc.
Deepsea Ventures, Inc.
Sun Ventures, Inc. (PA)
Hannah Shipping, Inc.
International Biomedical Instruments, Inc.
License Royalty Corporation
Pentagon Industries
Universal Audio, Inc.
Sun Ventures, Inc. (DE)
The VLM Corporation
Financial Companies
Ardprop, Inc.
Ardvest, Inc.
Sun-Del Services, Inc.
Sun International Finance Corporation
The Claymont Investment Company
Sunoco Credit Corporation
Helios Assurance Company, Ltd.
Oil Insurance Limited
Solcar Properties, Inc.
Warbonnet Company
Thunderbird Stations, Inc.
Second Thunderbird Stations, Inc.
Third Thunderbird Stations, Inc.
Fourth Thunderbird Stations, Inc.
Name Saver Companies
Admiral Paint Company, Inc.
Carboline American, Inc.
Carboline Marine Corporation
Premier Petroleum Company
Sun Company, Inc.
Sun Financial Services, Inc.
Sun Gas Company, Inc.

Sun Oil Company
Sun Petroleum Products Company, Inc.
Sun Production Company
Sun Texas Company
Suncoal, Inc.
Sunmark Exploration Company
Sunmark Industries, Inc.
Sunmark North Sea Oil Company
Sunray DX Oil Company
Suntide Refining Company
The Moran Paint Company

Inactive Companies

Can-Am Barge Company, Inc.
Caribe Sun Oil Company
Duncan Refining Company, Inc.
Sun Zippy, Inc.

DEC 9 1980

No. 80-843

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CARIBE TRAILER SYSTEMS, INC. and JOHN R. IMMER,

*Petitioners,*

*v.*

PUERTO RICO MARITIME SHIPPING AUTHORITY, *et al.*,

*Respondents.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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January 9, 1981

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## REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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## STATEMENT OF THE CASE[1]

The Report of the "Governor's Commission" (which was a commission reporting to the Puerto Rico Senate) was not revealed to the case until April 10, 1980, when it

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[1] Pursuant to the provisions of Rule 28(1) of the Rules of this Court, Caribe Trailer Systems, Inc., a corporate petitioner to this case, states that it has no parent company, affiliate or subsidiary.

was included as Exhibits A and B in the *amicus curiae* brief of the Attorney General. During the life of this commission Mr. Francis Kesterman served as a shipping consultant to the Puerto Rico government and spent most of that time in Washington, D.C. (Pet. App. 43a). This was at a time when counsel for Sea-Land, GPRL, McLean and Reynolds "met on occasion with counsel and with representatives of PRMSA in the District of Columbia for purposes of negotiating contract terms" (Brief in Opposition, p. 4).

The report of the Commission predicted a cash flow to the Commonwealth of $1,246.0 million between 1974 and 1985. In its first five years PRMSA has had an operating loss of over $38 million or a loss of $7.6 million per year.

When the Commonwealth attorneys sought a Business Review Letter from the Attorney General they represented that PRMSA would be under the control of FOMENTO, the Puerto Rico Development Agency. They specifically excluded the proposed management contract with a Sea-Land affilliate and never revealed to the Attorney General that a management contract had already been signed with this affilliate (PRMMI). They never revealed (officially) the actual provisions of the PRMSA Act as passed or provided a copy to the Attorney General. The original application was never amended to include PRMSA although PRMSA was in existence prior to July 22, 1974, the date of issuance of the Business Review Letter.

In their amended complaint of July 21, 1978 (C.A. Joint App. 7), petitioners listed 9 specific charges of action taken by respondents in connection with their conspiracy and creation of a monopoly. Respondents had the opportunity to disavow, dispute or question those

charges and other charges of the complaint if they were not true or to initiate discovery to disprove them. They did none of these things. In fact, they admitted to the charges of conspiracy and creation of a shipping monopoly. See Petitioners' Opening Brief before the Court of Appeals, pp. 27-30.

Petitioners participated as intervenors in the proceedings before the Federal Maritime Commission which produced the documents relied upon in this case. Based on these documents, Caribe in 1977 presented a 106-page complaint to the Attorney General charging violations of the Sherman Antitrust Act and other federal laws and regulations. This complaint was directed largely against the Maritime Administration (Marad) which had rejected Caribe's loan guarantee application.

Marad was under the Secretary of Commerce who at that time was Mrs. Juanita Kreps, on temporary leave as a director of R. J. Reynolds Industries, Inc., one of the respondents. Caribe's complaint was handled by Mrs. Patricia Wald, Assistant Attorney General for Congressional Affairs, who later became one of the judges assigned to the panel of the case. Shortly after her assignment to the panel, the Court ordered *sua sponte* the United States to enter an *amicus curiae* brief. Petitioners were notified of this action on the day of oral argument and were not aware of Judge Wald's previous experience with the case until research involved with the reply to the *amicus curiae* brief revealed a letter signed by Mrs. Wald as Assistant Attorney General. A copy of this letter was included as an exhibit to petitioners' reply and sent to all respondents.

Petitioners used the argument of the Commerce Clause before the District Court in their Opposition to Motion for Summary Judgment Filed by Sea-Land Service, Inc.

of August 24, 1978. At p. 3 they cited *Southern Pacific Company v. State of Arizona*, 325 U.S. 761, 769, 65 S. Ct. 1515, 89 L. Ed. 1915 as asserting the supremacy of the Commerce Clause. Both the citation and the argument were ignored by the Judge. The Commerce Clause was argued in their Opening Brief before the Court of Appeals (at pp. 10-12) and in their Reply to Amicus Curiae Brief of May 21, 1980 (pp. 25-28).

Petitioners argued in their Reply to PRMMI and TKM of June 6, 1978 (C.A. Joint App. 97) that "Puerto Rico has no authority to immunize an extraterritorial anti-competitive conduct". Their Reply to PRMSA, PRPA and TTT of May 25, 1978 (C.A. Joint App. 80), had a complete page of argument that the Commonwealth of Puerto Rico could not grant immunity because of the limitations imposed by the Second Puerto Rico Organic Act. The judge ignored the argument and the citations in his decision. Petitioners' argument was resumed before the Court of Appeals in their Opening Brief at pp. 14-21.

## REASONS FOR GRANTING THE WRIT

That the type and quality of shipping facilities to the island of Puerto Rico is vital and paramount to the economic health of the Commonwealth is emphasized by respondents as well as by petitioners. There is no argument to the statement (Pet. 10) that Puerto Rico is the largest off-shore maritime customer of the United States.

The basic issue of this case is whether that trade shall be made available to private enterprise or privately financed shipping or shall it be permitted to continue as a government-owned shipping monopoly that is strangling the island. Ancillary is the question of whether or not the Commonwealth legislature can immunize a shipping operation operating beyond its territorial boundaries in such a

way as to restrain interstate commerce between the island and the mainland.

Petitioners will show by brief that the trade has been restrained and that the monopoly has strangled the economy of Puerto Rico. The projections for expansion of trade made by Marad in 1973 (Pet. 10) have not been realized. It is the people of Puerto Rico who have the most to gain by opening up this trade to privately financed shipping and it is the people of Puerto Rico who will pay the price if the monopoly is allowed to continue.

Respondents have not been able to reply to the specific cases cited as being in conflict with the decision of the lower court. They have offered no defense or reply to the array of Supreme Court cases cited in the petition supporting the plea of the petitioners. Their defense remains unsupported by any case law and the few cases presented provide more support for the contentions of petitioners than respondents.

## I.

### Public Law 62 (PRMSA Act) Is Not a Regulatory Act. It is an Act Setting up a Government-Owned Shipping Monopoly in the Interstate and Foreign Commerce of the Island.

Public Law No. 62 (1974) is not a regulatory act. *Parker* applied the state action concept to a strictly regulatory function and emphasized that no instrumentality of the state was involved in an anticompetitive act. Both cases relied upon by respondents to support state action emphasized the restriction of the theory to a strictly regulatory function and that there must be a policy of "active supervision" by the state. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*, ____ U.S. ____, 100 S. Ct. 937 (1980) and *New Motor*

*Vehicle Bd. v. Orrin W. Fox Co.*, U.S. 96 (1978). Both cases involved regulatory measures applying only within the state.

Public Law No. 62 receives no benefit from these two cases as it specifically excludes any degree of supervision, control or approval "by any department, division, commission, board, bureau or agency of the Commonwealth of Puerto Rico." (C.A. Joint App. 58).

Public law 62 involves no regulation but authorizes complete ownership and control without limit over the foreign and interstate commerce of the Commonwealth.

## II.

**That the Lower Courts Did Not Rule on the Validity of the PRMSA Act Under the Second Organic Act of Puerto Rico and the Commerce Clause Was Reversible Error.**

Petitioners will show in brief that they presented argument and cited cases before the District Court averring that the PRMSA Act was illegal under the Second Organic Act and under the Commerce Clause of the Constitution. Specific argument to this effect was presented to the District Judge on May 25, 1978 (C.A. Joint App. 80), June 6, 1978 (C.A. Joint App. 97) and Aug. 24, 1978 and both the argument and the citations were ignored. This omission was reversible error.

Before the Court of Appeals petitioners claimed again that the PRMSA Act was illegal and provided no immunity from federal law for any of the respondents. (Opening Brief at pp. 14-22; Reply Brief at pp. 1, 5; Reply to Amicus Curiae Brief at pp. 17, 18—Commerce Clause at pp. 1, 4, 5, 7, 9-12, 15, 25-28 and 34). It was reversible error that the Court of Appeals did not consider the

constitutional question so raised both under Art. 1, § 8, cl. 3 and Art. 4, § 3, cl. 2. Respondents admit at pp. 13-14 of their Reply Brief herein, that these two issues were omitted from the lower decisions leaving only the Supreme Court to consider these constitutional issues.

Judge Gasch ruled on July 8, 1978 that plaintiffs satisfied the requirements of Rule 12(e) of the Federal Rules of Procedure to provide "fair notice of plaintiffs' claim" with an expanded paragraph 22 of the complaint which was filed with the trial court on July 21, 1978 (C.A. Joint App. 7).

The adequacy of plaintiffs' charges was thus ruled on and supported by the lower court and never again questioned. It is too late now to question them. The question of the constitutionality of the PRMSA Act arose automatically when respondents claimed that it gave them immunity from the Sherman Antitrust Act, §§ 1, 2 and 3. Plaintiffs raised this question very early in the proceedings and raised it again before the Court of Appeals.

## III.

### That Serious Departures from the Usual Course of Proceedings in the Federal Courts Have Occurred Has Not Been Denied or Protested by Respondents.

Charges at Pet. 18-20 that Judge Wald of the appellate panel was previously involved with the case in her capacity as Assistant Attorney General and at that time handled plaintiffs' complaint directed at Marad were supported by a letter signed by Judge Wald which was distributed to all parties. It is not denied that at this time, Mrs. Juanita Kreps, then Secretary of Commerce, was on temporary leave of absence as a director of R. J. Reynolds Industries, Inc., one of the respondents.

The questions raised by petitioners at pp. 18-20 introduce a substantial issue of interference with the federal judicial processes by private litigants. Yet, respondents offer no reply or rebuttal in their reasons why the writ should not be granted.

They ignore the fact that the District Court heard the arguments on the constitutionality of the PRMSA Act but omitted all reference to this issue in its decision. With no protest by respondents the charges that "the judge then proceeded to justify this decision by assertions that were not supported by case law and, in fact, were violative or contradictory of all court decisions pertinent to this area" gain additional weight and indicate a bias.

Not only did petitioners advance arguments challenging the constitutionality of the PRMSA Act before the District Court but in one instance gave it a major heading in its brief filed before the court. In its Reply of May 25, 1978 (C.A. Joint App. 80) petitioners said:

> "B. Assuming a state could establish such an extra-territorial monoply with immunity from the antitrust laws under Parker v. Brown, the Commonwealth of Puerto Rico would not do so because of limitations in the Second Puerto Rico Organic Act."

How could the judge have overlooked such a title at the very top of the page? The question must arise whether or not the omission was deliberate or intentional. This question is supported by the reference by respondents at p. 11 to the decision of the lower court at Pet. App. 25a, 26a: "*Parker v. Brown* . . . involved action by the State of California to raise and stabilize the price of raisins, *ninety five per cent of which were sold outside*

*the state.* 317 U.S. at 345" [Emphasis added]. This appears as an effort to establish the validity of state action when interstate commerce is concerned even though *Parker* said exactly the opposite and emphasized that the decision involved only local manufacture and specifically excluded matters affecting interstate commerce.

## IV.

### No Defense Offered to Conley v. Gibson.

Petitioners relied on *Conley v. Gibson*, 355 U.S. 41-46, 78 S. Ct. 99, 2 L. Ed. 2d80 (1957) at pp. 22 and 23 of their petition for their claim that both the District Court and the Court of Appeals had improperly denied their choice of forum district and the benefits of the District of Columbia's "long arm" statute.

Petitioners stated at p. 23, "To reach this decision the Court had to reject the allegations of plaintiffs before any discovery had been allowed which denied plaintiffs the safeguards in this respect assured to them by *Conley v. Gibson, supra.*"

Respondents offer no defense to the guarantees which *Conley v. Gibson* offers except to say (at p. 5) that petitioners did not attempt to initiate any discovery. It is equally true that respondents did not attempt to initiate any discovery. Petitioners, in their Opening Brief before the Court of Appeals (pp. 51-53) charged error of the lower court for failure to accept "plaintiffs' material allegations of fact as true." and cited *Ammerman v. Miller,* 432 F. 2d 621 (D.C.C.A. 1970) wherein a previous decision of Judge Gasch was reversed on this point.

Petitioners relied on the safeguard of having their allegations taken as true and all inferences drawn favorable to them. *Athletes Foot of Delaware v. Ralph*

*Libonati Co.* 445 F. Supp. 35, 50 (D. Del. 1977) (Cited at C.A.O.B. 51). In brief petitioners will document specific instances where the lower court rejected petitioners' allegations in order to sustain the contrary argument taken in the decision.

## CONCLUSION

Respondents as well as petitioners have emphasized the great importance of the issues of this case to the people and economy of Puerto Rico. Respondents' statements that the PRMSA Act was not challenged before the lower court are refuted by the facts and the pleadings. The specific case references cited by petitioners have not been challenged. The few cases they offered in support of their position supported petitioners more than respondents.

For the above reasons the Petition for Certiorari should be granted or summary reversal should issue.

Respectfully submitted,

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